

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

In the matter of:

The Digital Performance  
Right in Sound Recordings | Docket No.  
and Ephemeral Recordings || 2005-1 CRB DTRA  
(Webcasting Rate  
Adjustment Proceeding)

Volume 11

Room LM-414  
Library of Congress  
First and Independence Ave., S.E.  
Washington, D.C. 20540

Wednesday,  
May 17, 2006

The above-entitled matter came on for  
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge  
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge  
THE HONORABLE STAN WISNIEWSKI, Judge

APPEARANCES

On Behalf of Sound Exchange

DAVID A. HANDZO, ESQ  
JARED O. FREEDMAN, ESQ  
PAUL M. SMITH, ESQ  
Jenner & Block  
601 Thirteenth Street, N.W.  
Suite 1200 South  
Washington, D.C. 20005  
(202) 639-6060  
dhandzo@jenner.com

GARY R. GREENSTEIN, ESQ  
General Counsel  
SoundExchange  
1330 Connecticut Avenue, N.W.  
Suite 330  
Washington, D.C. 20036  
(202) 828-0126  
greenstein@soundexchange.com

On Behalf of National Public Radio  
Inc. (NPR), NPR Member Stations, CPB-  
Qualified Public Radio Stations

DENISE B. LEARY, ESQ  
635 Massachusetts Ave., NW  
Washington DC 20001  
202.513.2049  
dleary@npr.org  
(202) 513-2049

On Behalf of Collegiate Broadcasters  
Inc. (CBI)

WILL ROBEDEE  
6100 South Main Street  
MS-529  
Houston TX 77005  
(713) 348-2935  
willr@ktru.org

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On Behalf of Royalty Logic, Inc.

KENNETH D. FREUNDLICH, ESQ.  
Schleimer & Freundlich, LLP  
9100 Wilshire Boulevard  
Suite 615 - East Tower  
Beverly Hills, California 90212  
(310) 273-9807  
kfreundlich@earthlink.com

On Behalf of Intercollegiate  
Broadcasting System Inc., Harvard Radio  
Broadcasting Co. Inc.

WILLIAM MALONE, ESQ  
Miller & Van Eaton PLLC  
1155 Connecticut Ave., NW  
#1000  
Washington DC 20036-4306  
202.785.0600  
wmalone@millervaneaton.com

On Behalf of Digital Media Assoc.  
(DiMA), AOL, Live365, Microsoft Corp.,  
Yahoo! Inc., National Public Radio

KENNETH L. STEINTHAL, ESQ  
Weil Gotshal & Manges LLP  
201 Redwood Shores Parkway  
Redwood Shores CA 94065  
(650) 802-3100  
kenneth.steintal@weil.com

KRISTIN KING BROWN, ESQ  
Weil Gotshal & Manges  
1300 Eye Street, N.W.  
Suite 900  
Washington, D.C. 20005  
(202) 682-7024

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On Behalf of AccuRadio, Discombobulated LLC,  
Digitally Imported Inc., myradio.com LLC,  
Radioio.com LLC, Radio Paradise Inc., 3WK  
LLC, Educational Media Foundation

DAVID D. OXENFORD, ESQ  
Davis Wright Tremaine LLP  
1500 K Street, N.W., Suite 450  
Washington DC 20005  
202.508.6656  
davidoxenford@dwf.com

On Behalf of The National Religious  
Broadcasters Noncommercial Music License  
Committee, Bonneville International Corp.,  
Clear Channel Communications Inc., Salem  
Communications Corp., Susquehanna Radio  
Corp., The National Religious Broadcasters  
Music License Committee

BRUCE G. JOSEPH, ESQ  
KARYN ABLIN, ESQ  
MATT ASTLE, ESQ  
MARGARET RYAN, ESQ  
SETH WOOD, ESQ  
Wiley Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 719-4913  
bjoseph@wrf.com

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P-R-O-C-E-E-D-I-N-G-S

9:34 a.m.

CHIEF JUDGE SLEDGE: Good morning.

Thank you. We'll come to order.

The first matter to consider this morning is the pending motion to strike portions of the direct testimony of Cathy Fink, and we have received a response to that motion.

Mr. Joseph, would you like to address that motion to begin?

MR. JOSEPH: Your Honor, I would like to introduce my colleague Seth Wood who would like to address that motion this morning.

CHIEF JUDGE SLEDGE: Seth?

MR. JOSEPH: Wood.

CHIEF JUDGE SLEDGE: Wood?

MR. JOSEPH: Yes, sir.

CHIEF JUDGE SLEDGE: All right,  
Mr. Wood.

MR. WOOD: Thank you, Your Honor.

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1                   As you say, we have a motion  
2 before you right now. It's a motion to strike  
3 and a motion in limine to restrict portions of  
4 Ms. Fink's testimony.

5                   The motion is made on this basis:  
6 Ms. Fink has, basically, willfully chosen to  
7 defy --

8                   CHIEF JUDGE SLEDGE: Just let me  
9 say something.

10                  MR. WOOD: Yes, sir, Your Honor.  
11 I'm sorry.

12                  CHIEF JUDGE SLEDGE: I meant to  
13 say before you began -- perhaps I can save  
14 something -- we have read your motion and we  
15 have read the opposition. So I invite you not  
16 to feel like you need to restate your motions,  
17 and simply, if you will, add any comments that  
18 you think are necessary in light of the  
19 opposition and/or anything that you feel like  
20 is not clear from your motions.

21                  MR. WOOD: Yes, sir. I'm sorry.

22                  CHIEF JUDGE SLEDGE: Thank you.

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1 MR. WOOD: In response to the  
2 SoundExchange arguments, three points that we  
3 want to make:

4 One is that they're essentially  
5 initially rearguing the same points that have  
6 been raised twice and rejected twice by this  
7 Board. The statement about the need to show  
8 prejudice on our part turns this own inquiry  
9 on its head.

10 This is a discovery dispute.  
11 Discovery standards apply. This isn't an  
12 admissibility question. There's reasons why  
13 you have a broader reach for discovery.

14 In this instance, Ms. Fink made a  
15 specific statement in her testimony that, "I'm  
16 not rich. I earn a modest living." From  
17 that, we sought discovery, and this Board  
18 approved it twice, once directly and once  
19 rejecting the motion for reconsideration. So  
20 that portion.

21 The third point, they state that  
22 we are seeking an overbroad remedy. Our

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1 remedy could not be more narrowly tailored at  
2 this point. We're only seeking to strike  
3 materials and limit testimony on the matters  
4 that were not turned over.

5 This Board certainly has wide  
6 discretion and could do a variety of things,  
7 including entering findings of adverse  
8 inferences. You could even strike her whole  
9 testimony for her contempt of the Board's  
10 order. But at this point we simply wish to  
11 make sure that she cannot testify about these  
12 matters to which we cannot adequately prepare.

13 So that's our opposition/response.

14 CHIEF JUDGE SLEDGE: Mr. Smith?

15 MR. SMITH: Good morning, Your  
16 Honor.

17 CHIEF JUDGE SLEDGE: Good morning.

18 MR. SMITH: I just want to make  
19 about three quick points to follow up on our  
20 brief.

21 I do acknowledge, as I think we  
22 did in the opposition, that Ms. Fink is not in

1 full technical compliance with the order. The  
2 question is not that, but what kind of  
3 response the Board ought to give in a  
4 situation where you have a third-party witness  
5 who's spent an enormous amount of her personal  
6 time just to represent all the other artists  
7 who each have relatively small amounts of  
8 money at stake, and has said, "I've produced  
9 everything about my music business," and has  
10 done that, and said, "But my personal tax  
11 returns, I want to draw a line on that."

12 I think it is important to  
13 recognize that we have produced, she produced  
14 voluminous financial documents covering every  
15 aspect of her musical career, including the  
16 tax returns for the corporation that reflect  
17 all of the receipts and expenses that relate  
18 to that.

19 She will say under oath that there  
20 is only a single number on her personal tax  
21 returns that relates in any way to her job as  
22 a recording artist, as a musician, which is

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1 the final bottom-line number of income that  
2 she receives from the Subchapter S  
3 corporation.

4 So we think the issue ought to be,  
5 in fact, prejudice, and if there is none, that  
6 everything that's in her direct testimony is  
7 fully linked up with a document that has been  
8 produced, and that there really isn't anything  
9 that they would do with these personal tax  
10 returns, that they're simply trying to strike  
11 some of the testimony because she's drawn this  
12 line.

13 And I would conclude by saying, if  
14 you do think that some portion of her  
15 testimony needs to be stricken, and I don't  
16 think you should, I think that striking two  
17 whole sections of it from the testimony goes  
18 too far. There really is nothing in the final  
19 section about the need for a fair royalty rate  
20 that would relate any way to the tax returns.  
21 So I think you should be much more narrow  
22 about what you don't allow testimony about,

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1 which would be specific matters going to her  
2 finances, which would be a much narrower rule  
3 than what they ask for.

4 Thank you.

5 CHIEF JUDGE SLEDGE: Thank you.

6 Anyone else want to comment on  
7 this motion?

8 (No response.)

9 Thank you.

10 This comes, as stated in the  
11 motions, following the motion to compel and  
12 the order of the Court granting that motion;  
13 the motion to reconsider that decision and the  
14 order of the Court denying reconsideration.

15 The movement does not object to or  
16 deny the response by SoundExchange that they  
17 have produced the numerous financial documents  
18 that describe in great detail her costs and  
19 revenues with respect to her music. She  
20 produced the federal income tax returns for  
21 the Subchapter S corporation through which she  
22 operates her music business, Community Music,

1 from 1999 to 2005, as well as other private  
2 financial documents, royalty statements, sales  
3 and cost data, agreements with other labels,  
4 and employee payrolls.

5 Her financial documents include  
6 detailed accounts of the cost to make her  
7 albums, amounts paid for studio time, amounts  
8 paid to musicians, advances received from  
9 labels, et cetera, as well as detailed annual  
10 summaries that list the amounts that she  
11 received from concerts, album sales,  
12 recordings, and royalties and the amounts that  
13 she paid for concert cost, equipment, payroll,  
14 production of albums, and office costs. She  
15 even produced a list of all of her musical  
16 instruments and their values.

17 She has testified that all of her  
18 music-related income goes through Community  
19 Music and that her personal returns reflect no  
20 music-related income other than with Community  
21 Music revenue.

22 In the status of the production

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1 and discovery, the Court concludes that  
2 sanctions to punish are inappropriate, that  
3 the sanctions appropriate are those that  
4 restrict the testimony to that which she has  
5 produced in response to the motions to compel  
6 and the orders of this Court.

7 The portions of her testimony that  
8 the Court concludes do not fit within the  
9 matters that she has produced and for which  
10 the motion to strike is granted is on page 10  
11 of her written testimony beginning at the  
12 bottom of page 9, the last full sentence, "But  
13 a home studio, even one like ours that is not  
14 elaborate, is not cheap to create or maintain.  
15 It requires purchasing and upgrading sound  
16 recording equipment, including high-quality  
17 microphones and preamplifiers which can be  
18 quite expensive. I estimate that we have  
19 invested about \$40,000 in our home studio."  
20 Those quoted sentences are stricken.

21 On page 12, the top of the page,  
22 "Unlike the stereotype of recording artists,

1 I am not rich. I earn a modest living as a  
2 full-time musician and recording artist, a  
3 tremendous achievement." Those two sentences  
4 are stricken.

5 At the bottom of that page,  
6 beginning with the last few words on the page,  
7 "It has by no means been easy and we certainly  
8 have not earned a fortune, but creating and  
9 performing children's music that entertains  
10 and captivates kids" -- correction: ending  
11 with the word "fortune." Beginning, again,  
12 "It has been by no means been easy and we  
13 certainly have not earned a fortune." Those  
14 phrases are stricken.

15 The Court concludes that the rest  
16 of the written direct testimony of the witness  
17 is matters that is supported by the evidence  
18 that has been produced, and beyond these  
19 matters, as identified, the motion is denied.

20 Anything further, Mr. Smith?

21 MR. SMITH: I just thought I would  
22 ask if the Board would think it helpful if we

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1 supplied a revised version of the documents  
2 that you have with those matters omitted.

3 CHIEF JUDGE SLEDGE: I think that  
4 would be unnecessary for this small amount.  
5 I believe we can --

6 MR. SMITH: Thank you, Your Honor.

7 CHIEF JUDGE SLEDGE: Thank you.

8 MR. SMITH: I appreciate doing  
9 that.

10 Let me also, then, introduce my  
11 college Jared Freedman from Jenner & Block,  
12 whose witness Ms. Fink is. So he's going to  
13 handle the witness.

14 CHIEF JUDGE SLEDGE: All right,  
15 thank you.

16 MR. STEINTHAL: On the same  
17 subject, I would like to introduce David  
18 Taylor from our office, who will be  
19 representing DiMA for purposes of this --

20 CHIEF JUDGE SLEDGE: We will do  
21 that later, so that I can keep my notes in  
22 place.

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1 MR. STEINTHAL: All right.

2 CHIEF JUDGE SLEDGE: Thank you,  
3 sir.

4 Mr. Freedman?

5 Ms. Fink, before you seat, would  
6 you please raise your right hand?

7 WHEREUPON,

8 CATHY ANN FINK

9 was called as a witness by Counsel for the  
10 SoundExchange and, having been first duly  
11 sworn, assumed the witness stand, was examined  
12 and testified as follows:

13 CHIEF JUDGE SLEDGE: Thank you.  
14 Be seated.

15 MR. FREEDMAN: Good morning, Your  
16 Honor. It is Jared Freedman for  
17 SoundExchange.

18 DIRECT EXAMINATION

19 BY MR. FREEDMAN:

20 Q Good morning. Can you please  
21 state your name for the record?

22 A Cathy Ann Fink.

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1 Q And where do you live?

2 A Kensington, Maryland.

3 Q What is your profession?

4 A I'm a musician, a music producer,  
5 recording artist, and performer.

6 Q What instruments do you play?

7 A I play the banjo, the guitar,  
8 accordion, fiddle, and assorted other things.

9 Q Do you also sing?

10 A Yes, I do.

11 Q How long have you been a recording  
12 musician?

13 A I've been a recording musician  
14 since about 1974, so over 30 years.

15 Q Can you describe for the Court how  
16 you got your start as a recording musician?

17 A My very first recording was  
18 probably right around 1974, a transcription  
19 recording for the Canadian Broadcasting  
20 Corporation in Canada. They called me up and  
21 said, "We're recording some artists that we  
22 want to have everyone to hear and we'd love to

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1 have you be on that."

2 Q At that time in 1974, how had you  
3 begun your career as a musician generally?

4 A My career as a musician really  
5 began by attending a lot of coffee houses and  
6 folk clubs in Montreal, where I was going to  
7 school, McGill University; falling in love  
8 with the music that I heard there. I already  
9 played a lot of music, but it seems like I  
10 found some genres that I really enjoyed. So  
11 I started attending open mike nights and  
12 eventually getting myself booked at many of  
13 those coffee houses and places, and slowly  
14 finding new venues, creating venues and  
15 finding new venues.

16 Q Do you today perform with a  
17 partner?

18 A I do.

19 Q And who is that?

20 A Her name is Marcy Marxer.

21 Q How long have the two of you  
22 performed together?

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1 A We started playing music together  
2 in 1980 and formed a full-time dual  
3 partnership in 1984.

4 Q What kind of music do you and Ms.  
5 Marxer perform and play?

6 A We play a lot of folk, traditional  
7 and contemporary folk, country, swing, Celtic,  
8 and one of our focuses is on music for  
9 children and families.

10 Q Do you play live performances?

11 A Yes, we do.

12 Q How often would you say?

13 A There are some years where we do  
14 50 or 60 shows. There's other years where we  
15 do as many as 250.

16 Q What kind of venues do you perform  
17 in?

18 A Well, I've actually performed in  
19 this building here with Patsy Montana, the  
20 first woman in country music to sell 1 million  
21 records. I performed this year at Strathmore  
22 Hall at the Kennedy Center. I have performed

1 at lots of elementary schools. I was at the  
2 Culpepper Library last night. It's a wide and  
3 varied career.

4 Q Have you also performed outside  
5 the United States?

6 A Yes.

7 Q Where are some of the places  
8 outside of the United States you've performed?

9 A Japan, Israel, New Zealand,  
10 Australia, the United Kingdom, and Canada.

11 Q Do you ever perform with other  
12 musicians?

13 A Yes.

14 Q Who are some of the notable  
15 musicians with whom you've performed?

16 A Well, I'll start with Patsy  
17 Montana, since she was the first woman in  
18 country music to sell 1 million records, but  
19 also Peter Seeger, Tom Paxton, Sweet Honey in  
20 the Rock, Mike Seeger, tons and tons of people  
21 in folk music.

22 Q During your career have you been

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1 nominated for any professional awards?

2 A I'm lucky to say yes.

3 Q What are some of the awards for  
4 which you have been nominated?

5 A I've been nominated for 10 or 11  
6 Grammy Awards. I've won two of those awards.  
7 I've been nominated for over 40 awards by the  
8 Washington Area Music Association and actually  
9 probably received about 45 WAMI awards. I've  
10 also won awards from the American Library  
11 Association, Parents' Choice Foundation,  
12 Openheim Toy Portfolio, Early Childhood News  
13 Directors' Choice Awards, and National  
14 Association of Independent Record  
15 Distributors.

16 Q You mentioned a moment ago you've  
17 won two Grammys.

18 A Yes.

19 Q What were the Grammys you won?

20 A In 2004 for a CD called "Bon  
21 Appetit! Musical Food Fun," and in 2005 for a  
22 CD called "Celebration: A Tribute to Ella

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1 Jenkins."

2 Q What was the category of Grammy  
3 that you won those for?

4 A Best Recorded Music for Children.

5 Q How many Albums have you released  
6 during your career?

7 A I think around 30.

8 Q I'd like to ask you some questions  
9 about the process of creating a sound  
10 recording. In your written testimony and you  
11 just mentioned an album called "Bon Appetit."  
12 What is that album "Bon Appetit"?

13 A That album is all on health and  
14 nutrition and the fun of food. It is a  
15 musical way to make some important messages  
16 and lessons in health and nutrition accessible  
17 to kids and families.

18 Q How did that album originate?

19 A That album actually originated  
20 starting about 15 years ago with a fan of  
21 Cathy Fink and Marcy Marxer from the World  
22 Bank who attended a lot of our music workshops

1 and concerts. He had heard some of our other  
2 children's music, and he sort of came up to me  
3 and said, "Hey, when are you going to do an  
4 album on health and nutrition for kids?" Once  
5 a year I would run into Allen at some event  
6 and he'd go, "Are you thinking about my  
7 album?"

8 About, oh, I can't remember how  
9 many years ago, five or six, seven years ago,  
10 he said, "Are you still thinking about my  
11 album," and I said, "Look, Allen, I'm thinking  
12 about your album. Here's how much money I  
13 need. Don't ask me again until you find the  
14 money."

15 And the next morning he called me  
16 up and he said, "Okay, I have your funding."  
17 I said, "Hey, why didn't we talk about that 15  
18 years ago?"

19 So he, basically, planted that  
20 seed, found a funder in Canada, the  
21 Micronutrient Initiative, and we embarked on  
22 what really turned out to be another year and

1 a half to two years of negotiations and  
2 discussions to take the project off the idea  
3 plate into the we're really going to do this,  
4 and then we did. We embarked on it.

5 Q What were the first steps of  
6 embarking on creating this album?

7 A Once we were past the contract  
8 issue and the sort of proposal part, which was  
9 just about a two-year deal, we created an  
10 advisory board of people, respected people in  
11 children's health and nutrition from the  
12 Center for the Science and Public Interest,  
13 the World Bank, the USDA, as well as a pool of  
14 parents who come to our concerts where we  
15 could bounce ideas off of them.

16 We interviewed all of these  
17 people, spent a lot of time with them. We  
18 also went to the internet and library  
19 resources that they recommended for us to sort  
20 of get a good background on the issues having  
21 to do with health and nutrition for kids,  
22 created a gigantic wishlist of what the songs

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1 might be about and sort of how the project  
2 might take shape.

3 Then Marcy and I went off into our  
4 own corners to do the research and start  
5 writing the songs. We did that over the  
6 course of a couple of months, reconnecting  
7 with the advisors when we had questions.

8 Eventually, we created a very sort  
9 of stark demo tape, working tape or CD, of  
10 what those songs were starting to look like to  
11 get their input, to make sure that it  
12 accurately reflected the information that we  
13 needed. Then, simultaneously, from our point  
14 of view, that we could take this stuff and  
15 make it be a fun sound recording for kids and  
16 families.

17 So we continued that process for a  
18 while, and eventually we said, okay, we've  
19 decided on the songs. The next step was to  
20 outline and figure out the actual process for  
21 recording the songs.

22 Q Let me ask you a follow-up

1 questions on one of the things you just  
2 mentioned. You mentioned a demo tape. What  
3 is a demo tape?

4 A A demo tape is really the simplest  
5 of tapes. It's not a sort of five days of  
6 recording one song. You're just going to sit  
7 down with your guitar or your keyboard or your  
8 drum and sing through it with vocal and maybe  
9 one instrument to give an outline picture of  
10 what that song will be.

11 Q So once you had this demo tape in  
12 place, how did you go from there to creating  
13 a final version of the sound recordings?

14 A The demo tape, we still took back  
15 lots of information from the various different  
16 advisors, made some adjustments once again to  
17 the songs, but then we sit down with the demo  
18 tape and we start creating our wishlist of  
19 what we want each song to sound like. This is  
20 sort of where the biggest fun part comes. We  
21 use our dreams. We use our imagination. We  
22 listen to other recordings and say, "Wow, I

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1 love how that sounds. I'd like to do an  
2 arrangement like that," all that kind of  
3 stuff.

4 We spend a fair amount of time  
5 brainstorming what we want each song to sound  
6 like. As we are doing that, we have to start  
7 creating a chart of what musicians will play  
8 a part in making that arrangement happen.

9 So we end up with a kind of giant  
10 chart of that for each of the songs, and then  
11 we organize that into what the studio sessions  
12 are going to look like.

13 Q Now on "Bon Appetit" are all of  
14 the songs in the same musical style?

15 A No, I think we have probably  
16 between eight and ten different musical styles  
17 on that recording.

18 Q What are some of those styles?

19 A There's some folk-sounding stuff.  
20 There's some old-time country string band  
21 stuff. There's some big band music. There's  
22 some blues. There's a steel drum calypso band

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1 and big band swing.

2 Q Do you know how many different  
3 instruments are played on the album?

4 A I really don't, but if it's  
5 anything under 50, I'd be surprised.

6 Q Does recording an album with so  
7 many different styles pose any particular  
8 challenges?

9 A It poses a lot of challenges  
10 because on a lot of sound recordings, when you  
11 have one genre being recorded, you have the  
12 same unit of people recording each of the  
13 songs. In our case, with children's music,  
14 because we like to represent eight to ten  
15 different genres within one sound recording,  
16 you may use eight to ten different musical  
17 band combinations to make that happen.

18 Q Do you and Ms. Marxer play all of  
19 the instruments on the album?

20 A We don't. We play quite a few of  
21 them. Ms. Marxer's quite talented and she  
22 probably plays 20 instruments on that album,

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1 and I probably play three, but I'm a very good  
2 typist.

3 Q What are the three that you think  
4 you may have played on that album?

5 A Well, I know I played the guitar  
6 and I know I played the banjo, and I sang. I  
7 also played the bouzouki, an Irish long-neck  
8 mandolin, and did a lot of harmony singing.

9 Q How long have you been playing  
10 those instruments that you just mentioned?

11 A Well, let's see, I've been playing  
12 the guitar for 40 years. I've been playing  
13 the banjo for about 35 years. I've been  
14 playing the bouzouki for eight or nine years.

15 Q Now you mentioned a minute ago  
16 that you create your dream arrangement, I  
17 think. How do you go from there to creating  
18 an actual sound recording? What's the next  
19 step?

20 A Well, the next step is often we  
21 make a more elaborate demo because we need to  
22 then get our ideas across to the musicians

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1 before they're going to come into the studio.  
2 Sometimes we create musical charts. Neither  
3 of us read music particularly well. So we use  
4 more of the demos for people to hear what we  
5 want to do. We create charts with the chord  
6 progressions. We give everybody the lyrics.

7 In some cases we have rehearsals  
8 prior to going into the studio. In other  
9 cases, because we're drawing musicians from so  
10 many different places, it's more cost-  
11 efficient to just spend an extra hour or two  
12 of studio time, give everybody the stuff to  
13 listen to before they come in, rehearse for an  
14 hour or two, go, "Wow, this sounds great now.  
15 Let's push the record button." So that's sort  
16 of how it works.

17 Q How long would you say it takes to  
18 -- for "Bon Appetit" how long would you say it  
19 took to record the album?

20 A You know, I know that we spent at  
21 least 100 hours. We, at the top of every  
22 project, have every great intention of

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1 punching the time clock and keeping a detailed  
2 log, but because we're in the freelance world  
3 of doing 20 different things at a time and  
4 they overlap, and they this and that, you  
5 know, after a while you've been in studio  
6 seven hours and you go, "I'm not opening that  
7 spreadsheet. I just spent more time. What  
8 the heck."

9 So at least 100 hours, but it  
10 could be more.

11 CHIEF JUDGE SLEDGE: I'm sorry,  
12 the last question was, how long does it take  
13 to record?

14 MR. FREEDMAN: Yes, sir.

15 CHIEF JUDGE SLEDGE: And what do  
16 you mean? What are you referring to when you  
17 say, "record"? It is used to describe a lot  
18 of things.

19 MR. FREEDMAN: Yes, well, maybe we  
20 should clarify.

21 THE WITNESS: Sure.

22 BY MR. FREEDMAN:

1 Q When we're speaking of the time  
2 spent recording, what part of the process are  
3 you referring to there when you talk about the  
4 100 hours?

5 A You know, I would say that that  
6 doesn't include the organizing time. It would  
7 include any time spent in the studio or  
8 preparing arrangements for the studio. I  
9 would say that it's not including things like  
10 setting up the schedule for everybody to come  
11 into the studio, but everything outside of  
12 that.

13 Q When you mention setting up the  
14 schedule to have people come into the studio,  
15 can you expand on that a little bit and  
16 describe what that is?

17 A Sure. If we've got 40 different  
18 musicians on this recording, what we need to  
19 do is put together a schedule that the right  
20 people are in the studio together at the right  
21 time. It's just a whole lot of phone calls  
22 and emails and scheduling and rescheduling,

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1 and that's what's involved.

2 Q And is that time spent in addition  
3 to the 10 hours you mentioned a minute ago?

4 A Yes.

5 Q Do the songs on "Bon Appetit" have  
6 multiple tracks on them?

7 A Yes, they do.

8 Q What is a track?

9 A Well, my best way of explaining  
10 that is, when you listen to a CD or a cassette  
11 in the old days, there's basically two tracks.  
12 You have stereo speakers. You have your left  
13 track, your right track.

14 These days people record in  
15 multiple tracks, thanks to Les Paul. So you,  
16 instead of having -- you know, what you hear  
17 is the mix-down of multiple tracks going down  
18 to the two tracks that your machine, your  
19 speakers, your iPod, whatever it is, can  
20 handle.

21 But prior to that, most of these  
22 things have multiple tracks where each vocal

1 part, each instrumental part goes on its own  
2 separate track.

3 Q Why do you record separate tracks  
4 for a song?

5 A You get a much cleaner-sounding  
6 recording by doing that and more opportunity  
7 for perfection.

8 Q You mentioned a song in your  
9 written testimony called "Banana." Do you  
10 recall how many tracks are recorded on that  
11 song?

12 A I believe that we hit the 48  
13 tracks mark.

14 Q How long does it take to record  
15 each track?

16 A Well, you know, if a song is two  
17 minutes long, you can say it takes two minutes  
18 to record each track, except you're probably  
19 going to record it, re-record it, fix it,  
20 improve it, fuss with it, and go back to it.

21 So, you know, each track could  
22 take as little time as starting from the



1 beginning to the end, whatever the length of  
2 the song is. The "Banana" song is probably  
3 about, I'm going to guess, three and a half to  
4 four minutes long. But you could also spend  
5 three hours getting one track and saying, "I'm  
6 happy with it." That might often be the case  
7 on a vocal track.

8 Q Once you've recorded all of the  
9 tracks on a song, what do you do with them?

10 A You go, "Wow, now I have to get  
11 these all down to two tracks, so that the  
12 general public can listen to it because they  
13 don't have a multi-track machine that can hear  
14 all 48 tracks like on "Banana."

15 So, basically, you start the  
16 process called mixing. You individually in  
17 that process listen to every single track and  
18 do a variety of treatments to do it. You  
19 might do equalization. You might do  
20 compression. You might do all different kinds  
21 of things to manipulate the sound of that  
22 track, and then at some point you're going to

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1 put that track into the mix and also  
2 manipulate the volume of it in different  
3 places, the panning, whether it comes out of  
4 the left speaker or the right speaker. As you  
5 add more tracks, you continue adjusting the  
6 other ones because it is a delicate balance to  
7 make the final product sound as good as you  
8 want it to sound.

9 Q Once you've done that mixing for a  
10 song, do you have a finished product?

11 A Well, you sort of have a finished  
12 product, although in our case you have mix No.  
13 1, version No. 1.

14 Q What do you do with version No. 1?

15 A What we like to do is take a break  
16 from listening to it and then go back and  
17 listen to it on multiple different sound  
18 systems and speakers, listen to it in the car,  
19 listen to it in all the different contexts  
20 where the consumer might listen to it, so we  
21 can hear it and say, "Oh, yeah, it sounds  
22 really good" or "Oops, there's too much base,"

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1 "Oops, the vocal's not loud enough,"  
2 "Everything's over on the right side." We  
3 take notes as we listen to things in all the  
4 different circumstances, and then we come back  
5 to the studio and make adjustments.

6 Q When those adjustments are done  
7 and you have all of the songs fully recorded  
8 and mixed, what is the next step of your  
9 involvement in creating a final product?

10 A The next step is what we call  
11 mastering. In that step you take all of your  
12 final mixes to a professional mastering  
13 engineer who dumps them into his or her  
14 system. You sequence the songs, which means  
15 what order do you want to hear them in. Then  
16 the mastering engineering goes through them  
17 one by one to make even further adjustments to  
18 make sure that -- the first thing you really  
19 do is something that we call top and tail.

20 It probably takes about five  
21 minutes per song, but the top and the end of  
22 each song is sort of in a raw form, and you

1 want to have a little fade-in and a little  
2 fade-out. It's the kind of thing that you  
3 wouldn't hear, but you would hear if somebody  
4 hadn't done it.

5 You adjust how much time is  
6 between each song. You adjust the volume from  
7 song to song. You want to make sure that the  
8 listener, when you're listening, doesn't have  
9 to change the volume because one song is so  
10 much louder than the next one.

11 You can make equalization changes,  
12 so that the -- let's say the bass is quieter  
13 on one song than on another song, and if you  
14 want to make them closer to the same, you can  
15 adjust that.

16 You can do what we call squash it,  
17 compress it. That's how rock-and-roll bands  
18 create tons and tons of energy, by using a lot  
19 of compression.

20 So there are multiple levels of  
21 things that you can do in the mastering  
22 process to try to put the finishing touches on

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1 a project that you're going to be happy with.

2 Q When that mastering is done, is  
3 your role complete in creating a final  
4 product?

5 A It's not.

6 Q What is the next thing you do?

7 A The next thing we do, which we're  
8 sort of working on in the background while  
9 we're doing everything else, too, is that we  
10 are involved in creating the liner notes and  
11 we are involved in overseeing the packaging.

12 Q Can you expand on what the  
13 packaging means?

14 A The packaging is the actual  
15 physical packaging of the CD. So it includes  
16 the artwork. It includes all of the written  
17 liner notes that are inside that give people  
18 information about the project.

19 Q We were talking about the album  
20 "Bon Appetit." How long did it take kind of  
21 soup to nuts on that album, start to finish,  
22 from when you started working on it until when

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1 you had a final physical product done?

2 A I believe we started early in the  
3 summer, and I believe we delivered the final  
4 project just before Christmas.

5 Q I would like to switch topics and  
6 ask you a couple of questions about the  
7 SoundExchange. Have you selected  
8 SoundExchange as the agent to collect and pay  
9 digital performance royalties?

10 A Yes, I have.

11 Q Now in your written testimony you  
12 mentioned you were impressed with the lengths  
13 to which SoundExchange goes to locate artists.  
14 Can you explain what you meant by that?

15 A I had received several phone  
16 calls, emails, and even in-person requests  
17 from people at SoundExchange looking for  
18 performers that they think I might know where  
19 to find because they've got money for these  
20 folks and they want to make sure it gets to  
21 the right people. I'm always impressed with  
22 that.

1 Q You also expressed concern in your  
2 written testimony about allowing webcasters to  
3 report performances of songs based on sampling  
4 techniques. What is your concern about that?

5 A Well, sampling is extremely  
6 incomplete, and I have a lot of concern that  
7 sampling will not aptly represent some of the  
8 music that doesn't get as heavy airplay or --  
9 I'm using the word "airplay," but webplay, or  
10 whatever it may be. I'm certainly concerned  
11 that it won't accurately represent what is  
12 getting played, and that if you actually have  
13 to report everything that's getting played,  
14 then everybody is being represented.

15 MR. FREEDMAN: If I may have the  
16 Court's indulgence for just a moment?

17 (Pause.)

18 I have nothing further, Your  
19 Honor.

20 CHIEF JUDGE SLEDGE: Thank you.

21 Any cross examination by DiMA?

22 MR. STEINTHAL: Yes, Your Honor.

1 David Taylor.

2 CHIEF JUDGE SLEDGE: Thank you.

3 Mr. Taylor?

4 CROSS EXAMINATION

5 BY MR. TAYLOR:

6 Q Good morning, Ms. Fink. I'm David  
7 Taylor, counsel for DiMA and the webcasters.  
8 How are you doing?

9 A Just fine.

10 Q Are you nervous?

11 A No.

12 Q That's good to hear. I'm a little  
13 nervous here, so if my voice shakes, I  
14 apologize.

15 (Laughter.)

16 Have you testified before?

17 A I won't do anything bad to you.

18 (Laughter.)

19 Q Okay, and I hope not to do  
20 anything bad as well.

21 (Laughter.)

22 With that said, my intention is



1 just to ask you some basic, simple questions,  
2 elicit yes-or-no responses, and nothing  
3 difficult, I assure you.

4 CHIEF JUDGE SLEDGE: Mr. Taylor,  
5 you remind me of my first jury trial ever  
6 which was a capital murder trial, and my voice  
7 was shaking quite a bit in that first trial.  
8 So I empathize with you.

9 THE WITNESS: Well, I hope I don't  
10 remind you of anyone in that trial.

11 (Laughter.)

12 BY MR. TAYLOR:

13 Q Ms. Fink, you don't have a copy of  
14 your direct testimony, but on page 4 of your  
15 direct testimony you had talked about the  
16 songs you had written and about them receiving  
17 critical acclaim. Could you tell the panel  
18 what those songs were?

19 A Well, I've probably written about  
20 300 songs, but I think in the testimony I  
21 specifically referred to a song called  
22 "Names," about the AIDS Memorial Quilt, which

1 won a Songwriters' Association Award, Mid-  
2 Atlantic Songwriters' Association Award.

3 I've received lots of other awards  
4 for different songs. A recent one, if you'll  
5 let me brag --

6 Q Sure.

7 A -- from the John Lennon  
8 Songwriting Contest, which gets 12,000  
9 entries. I just received their Lennon Award  
10 for a song called, "Scat Like That: A Musical  
11 Word Odyssey."

12 Q Are there any other songs that  
13 you've written that have won awards?

14 A Specific songs that have won  
15 awards, I'm not recalling. Entire recording  
16 projects have won lots of awards.

17 Q And those were recording projects  
18 that you wrote?

19 A Many of them, yes.

20 Q Were the Grammys, did you write  
21 the songs that you won Grammys for?

22 A The first Grammy, "Bon Appetit!

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1 Musical Food Fun," I believe we wrote eight or  
2 nine of the songs on that project, and  
3 "Celebration: A Tribute Ella Jenkins," I  
4 didn't write any of the songs. It was a  
5 tribute to another songwriter.

6 Q Do you understand the purpose of  
7 this proceeding is to set a royalty rate for  
8 webcasting?

9 A I do.

10 Q Do you understand that file-  
11 sharing is different than webcasting?

12 A Yes, I do.

13 Q And do you understand that the  
14 particular webcasting that's the subject of  
15 this proceeding is non-interactive webcasting?

16 A Yes.

17 Q Good. So you're familiar with  
18 internet radio?

19 A Yes.

20 Q Are you familiar with the internet  
21 radio services offered by DiMA member  
22 companies?

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1 A Can you name which specific  
2 companies?

3 Q Sure, of course. Like AOL's  
4 internet radio.

5 A Uh-hum. Yes.

6 Q How about Yahoo's internet radio?

7 A Yes.

8 Q And how about Live365?

9 A I'm familiar with it. I haven't  
10 listened to it, but I'm familiar with it.

11 Q Okay.

12 MR. TAYLOR: I am going to pass  
13 out Services Exhibits 73 and 74.

14 [Whereupon, the  
15 documents were marked as  
16 Services Exhibits 73 and  
17 74 for identification.]

18 BY MR. TAYLOR:

19 Q It's your testimony, is it not,  
20 that you're not aware of any promotional value  
21 of webcasting?

22 A I'm not aware of any research that

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1 proves the promotional value of webcasting.

2 Q But are you aware -- but is it  
3 your testimony that there is no promotional  
4 value to webcasting?

5 A I believe my testimony says I'm  
6 not aware of research that proves that, but  
7 you can correct me about what I said.

8 Q I direct you to -- which you don't  
9 have; I apologize. You are correct; you state  
10 on page 14, "I'm not aware of any evidence  
11 that shows that webcasting promotes the sale  
12 of music."

13 A I'm glad I remembered what I said.

14 Q Are you familiar with internet  
15 search features that allow listeners to search  
16 by artist or song?

17 A I am familiar -- you know, I use  
18 Google. There may be many other ways of doing  
19 it, but I haven't used them.

20 Q Okay. I direct you to what's  
21 marked as Services Exhibit 73. It's a Live365  
22 screenshot.

1 A Okay.

2 Q It says, "Find Stations that Play"  
3 -- is that consistent with something like  
4 Google would have?

5 A I have never used this.

6 Q Okay. But you are familiar with  
7 the search feature?

8 A Right.

9 Q And who is the artist that's being  
10 searched for on this screenshot?

11 A Cathy Fink.

12 Q Okay. If you turn to Services  
13 Exhibit 74, that returns four different  
14 stations that offered Cathy Fink music. Can  
15 you tell us what the four stations are?

16 A It says what the shows are. It  
17 doesn't really say what the stations are,  
18 unless I'm missing that somewhere.

19 Q It says station title and  
20 description, and underneath it has like a  
21 little --

22 A James Rambles, Roots Music, Loopy

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1 Moose Radio, Internet Folk Festival.

2 Q Okay. Do each of those list your  
3 name next to them?

4 A Yes, they do.

5 Q Okay, if you could turn to the  
6 next page on Exhibit 74, this is another  
7 screenshot. Which service is this? Is this  
8 one of the four that you mentioned?

9 A Yes, it is, James Rambles.

10 Q Are you familiar with the player  
11 feature on internet radio?

12 A With the what feature?

13 Q The player feature.

14 A Yes.

15 Q Okay. In the middle of the page,  
16 what does this player say is now playing?

17 A Maddy Pryor and June Tabor, "The  
18 Grey Funnel Line," and Cathy Fink and Marcy  
19 Marxer, "Time to Learn."

20 Q And is there anything else?

21 A "Finest Kind," which is then  
22 partly not there.

1 Q Okay. Perhaps it says, "Fa So  
2 La"?

3 A Yes.

4 Q Are you familiar with the song?

5 A No, but I know the group.

6 Q But you know the group. And "Time  
7 to Learn," is that a song of yours?

8 A No, it was written by Tim O'Brien.

9 Q But is it a song that you  
10 performed?

11 A Yes.

12 Q Okay. Are you familiar with the  
13 Buy button to the left?

14 A Yes.

15 Q And what is your understanding of  
16 the Buy button?

17 A If you push that button, you have  
18 an opportunity to purchase that song.

19 Q Would you collect a royalty from  
20 that?

21 A A tricky question. Officially,  
22 yes. That is on a label Rounder Records who

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1 have yet to figure out how to stream those  
2 royalties down to the artists.

3 (Laughter.)

4 Q Okay, I apologize for that. Let  
5 me clarify my question. Are you supposed to  
6 receive a royalty from that?

7 (Laughter.)

8 A Yes.

9 Q Okay, great. If you could turn to  
10 the next page, there's another screenshot.  
11 Could you tell us what the internet service or  
12 the broadcaster that's identified there is?

13 A The Internet Folk Festival?

14 Q Yes. Is that one of the four that  
15 was identified on the first page?

16 A I believe it was.

17 Q Are you familiar, other than the  
18 player on an internet radio site, that  
19 internet radio providers also have other areas  
20 of the website that allow people, allow  
21 listeners to purchase your music?

22 A I don't understand your question.

1 Q Oh, that's perfectly  
2 understandable because I barely understand it  
3 myself.

4 (Laughter.)

5 I refer you to the bottom of the  
6 page. My question is, are you familiar with  
7 the fact that internet radio providers also  
8 provide other areas of their site other than  
9 the play area that we just previously  
10 discussed as possible areas where music could  
11 be purchased?

12 A Sure. Yes.

13 Q And down at the bottom, are there  
14 any artists that are offered there?

15 A Yes, there are.

16 Q And who are they?

17 A Jim Murray, Cathy Fink and Marcia  
18 Marxer, and Joan Baez.

19 Q And the Cathy Fink is you, right?

20 A Yes.

21 Q What's the song?

22 A "Daughters of Feminists."

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1 Q Is that a song that you performed?

2 A Yes.

3 Q Did you write the song as well?

4 A No.

5 Q Okay. If you hit the -- and over  
6 to the left again, what is there?

7 A The Buy button.

8 Q Again, is your testimony that you  
9 have the option to purchase the music when you  
10 click on that button?

11 A Yes, you do.

12 Q Okay. Do you know if -- one  
13 second.

14 (Pause.)

15 [Whereupon, the document  
16 was marked as Services  
17 Exhibits 75 for  
18 identification.]

19 Q I think you testified a little bit  
20 earlier ago that listeners have an opportunity  
21 to buy music once they click on the Buy  
22 button. In this case are you familiar with

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1 what are the options for people to buy the  
2 music as -- excuse me. Are they able to buy  
3 a CD or a digital download? Do you know?

4 A In this case it looks like they  
5 buy a download per song.

6 Q A download per song? So you  
7 recognize what this document is?

8 A I do.

9 Q And what is the document?

10 A It looks like a list of everything  
11 that MSN Music Entertainment offers under the  
12 name of Cathy Fink and Marcy Marxer. It's  
13 just astounding.

14 Q It's prolific, to say the least.  
15 Now at the top of this page,  
16 what's the top of the page -- what's the song  
17 that's listed?

18 A "Daughters of Feminists."

19 Q Is that the same song that was on  
20 the service?

21 A Yes.

22 Q So it looks like you were led to

1 the Microsoft website?

2 A Yes.

3 Q Okay. So, again, the very first  
4 song that's listed in the chart is?

5 A "Daughters of Feminists."

6 Q And if you go all the way over to  
7 the right, how much would you pay for it?

8 A Ninety-nine cents.

9 Q Okay. Are you supposed to --  
10 would a listener be able to purchase all your  
11 other songs here?

12 A I'm not looking to see if all of  
13 my songs are here, but they can certainly  
14 purchase anything that's listed.

15 Q Okay. Would you -- it looks like  
16 to me just that the search result led to 260  
17 matches. So it's possible that up to 260  
18 matches could be purchased, is that correct?

19 A Yes, it is.

20 Q All right. And you would receive  
21 royalties from that? You're supposed to  
22 receive royalties from that?

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1 A You've done a good self-correct.

2 MR. TAYLOR: Your Honor, I move  
3 to --

4 THE WITNESS: Now wait a minute.  
5 There's a lot of songs on here that aren't us.  
6 So are you counting them?

7 BY MR. TAYLOR:

8 Q When you say aren't you, what did  
9 you mean by that?

10 A Well, if you go to the last couple  
11 of pages, it lists all kinds of songs that  
12 have the word "daughters" but doesn't have  
13 Cathy Fink or Marcy Marxer. It's lots of  
14 other artists. So I think 260 is not accurate  
15 on this service.

16 "In Your Absence" from something  
17 by the Autistic Daughters, "Daughters of  
18 Aaron," "The Secret Garden."

19 Q Okay.

20 A So the Cathy Fink and Marcy Marxer  
21 stuff ends -- now these pages aren't actually  
22 numbered because it's always "page 1 of 2."

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1 Q Yes.

2 A But I would say that the last four  
3 or five, six, seven pages or so starts  
4 reflecting songs that don't have Cathy Fink  
5 and Marcy Marxer. And, actually, earlier than  
6 that. If you look here, there's --

7 Q I look at -- it's 61 through 80 is  
8 where the first time it deviates from Marcy  
9 Marxer.

10 A Uh-hum.

11 Q Is that fair to say?

12 A Well, I haven't had time to study  
13 it like you have. All I'm doing is glancing  
14 and noticing that there's a lot of acts here  
15 that aren't Cathy Fink and Marcy Marxer.

16 Q Okay. So if you want, we can go  
17 through the document.

18 A In fact, they're all over the  
19 place.

20 Q If you --

21 A So if all songs here is 260  
22 matches, I think we'd have to take the time to

1 count how many of them are actually Cathy Fink  
2 and Marcy Marxer.

3 Q All right, but you do say that  
4 some part of this document represents songs  
5 that you have recorded and performed?

6 A Some part of it, yes.

7 Q Okay.

8 MR. TAYLOR: Your Honor, at this  
9 time I move Services Exhibit 75 into evidence.

10 CHIEF JUDGE SLEDGE: On what  
11 basis?

12 MR. TAYLOR: She identified that  
13 she did recognize the document to be an  
14 offering by Microsoft MSN's music site and  
15 it's an offering of some part of the songs  
16 that she has recorded.

17 CHIEF JUDGE SLEDGE: Within this  
18 document are some songs that can be purchased  
19 that she has recorded?

20 MR. TAYLOR: Yes.

21 CHIEF JUDGE SLEDGE: Any  
22 objection?



1 MR. FREEDMAN: No, Your Honor.

2 CHIEF JUDGE SLEDGE: Without  
3 objection, Exhibit 75 is admitted.

4 [Whereupon, the document  
5 marked as Services  
6 Exhibit 75 for  
7 identification was  
8 received in evidence.]

9 BY MR. TAYLOR:

10 Q Earlier on your direct testimony,  
11 Ms. Fink, you were describing what you do.

12 JUDGE ROBERTS: Mr. Taylor, one  
13 moment before we move away from Exhibit 75.

14 MR. TAYLOR: Sure.

15 JUDGE ROBERTS: Ms. Fink, if you  
16 would look at Exhibit 75, where it's  
17 identified as the artist Fink, and in  
18 particular I'm looking at "Son of Finkenstein"  
19 or "Finkenstein."

20 THE WITNESS: No children that I  
21 know of.

22 (Laughter.)

1 JUDGE ROBERTS: Is that your work?

2 THE WITNESS: No, it's not.

3 JUDGE ROBERTS: Or is that another  
4 Fink?

5 THE WITNESS: That's not my work.

6 JUDGE ROBERTS: That is not your  
7 work? Okay. Thank you.

8 THE WITNESS: I'm going to tell  
9 you the majority of stuff in this is not my  
10 work.

11 JUDGE ROBERTS: Is not your work?

12 THE WITNESS: The first few pages  
13 represent stuff that looks like my work, and  
14 then there are many pages that have none of my  
15 work and a few pages that have one or two  
16 songs.

17 JUDGE ROBERTS: One more minute,  
18 Mr. Taylor.

19 And where Ms. Marxer is identified  
20 as Marcy Marxer --

21 THE WITNESS: Yes.

22 JUDGE ROBERTS: -- is that her

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1 work or is that co-authored work?

2 THE WITNESS: I would really -- if  
3 it just says her name, that's her sound  
4 recording.

5 JUDGE ROBERTS: But that does not  
6 involve you?

7 THE WITNESS: Right.

8 JUDGE ROBERTS: Okay. Okay, Mr.  
9 Taylor.

10 BY MR. TAYLOR:

11 Q Earlier in your direct testimony  
12 you were describing what it took for you to  
13 record "Bon Appetit," is that correct?

14 A Uh-hum.

15 Q And a lot of what you described is  
16 what a record company would do for an artist  
17 that they had signed, is that correct?

18 A My record company never does that  
19 for me.

20 Q Okay.

21 A And I'm signed with a record  
22 company. So specifically what did I say that

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1 you think a record company would normally do?

2 Q So do you run your own record  
3 company?

4 A We do have several records on our  
5 own small, independent label, although the  
6 majority of our recordings are on Rounder  
7 Records, an independent label.

8 Q For those recordings that are on  
9 your own label, on your own record company,  
10 there would be -- you're responsible to  
11 produce all of your albums, is that correct?

12 A We're responsible for what?

13 Q The production of your albums?

14 A The --

15 Q As the record company.

16 A The artistic production? The  
17 manufacturing? What --

18 Q The artistic production.

19 A Yes, we're responsible of that  
20 regardless of who puts it out.

21 Q But artists generally -- to be a  
22 performing artist, you don't have to do

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1 everything that you did, that you do in your  
2 situation, is that correct? There are  
3 circumstances where an artist has come into a  
4 studio and performed?

5 A I guess.

6 Q Okay.

7 A I don't live in that world; I  
8 don't know.

9 Q Okay. So your statements don't  
10 necessarily reflect the circumstances for all  
11 performing artists?

12 A No.

13 MR. TAYLOR: There's nothing  
14 further.

15 CHIEF JUDGE SLEDGE: Mr. Wood,  
16 will you handle cross?

17 MR. WOOD: Yes, Your Honor.

18 CROSS EXAMINATION

19 BY MR. WOOD:

20 Q Good morning, Ms. Fink.

21 A Hi.

22 Q Seth Wood on behalf of the

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1       broadcasters, and I hope you'll give me about  
2       as much indulgence as you gave the last  
3       gentleman. It's my first shot at this as  
4       well. So we'll see how this goes.

5               I wanted to ask you about, I  
6       guess, your statement at 5, on page 5 of your  
7       statement there. On the second full paragraph  
8       and the second sentence, would you mind  
9       reading that?

10            A       "Our audiences may never be aware  
11       of just how long an idea must germinate in an  
12       artist's creative consciousness or  
13       subconscious before it is ripe for  
14       expression."

15            Q       You gave a specific example of a  
16       "Bon Appetit" album. That's in your testimony  
17       and your statement, right?

18            A       Uh-hum. Yes. Sorry.

19            Q       How many months would you say you  
20       spent writing the recording? I'm sorry, not  
21       writing it. Writing, putting together,  
22       conceptualizing your album?

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1 A About four.

2 Q About four? Okay.

3 A I would say four in official terms  
4 because we knew this contract was coming up.  
5 Once the contract was signed, even though we  
6 hadn't said, okay, now that we're working on  
7 this project -- you walk around with a  
8 constant awareness that this project's coming  
9 up, and anything you see, hear, or do that  
10 could be worthwhile goes into a little  
11 notebook, so that you can refer back to it.  
12 But in terms of the official this is what  
13 we're really going to spend our time on, I'd  
14 say about four months.

15 Q Okay. So it's kind of a constant  
16 process of writing kind of in the back of your  
17 head?

18 A Right.

19 Q Okay. You originally kind of  
20 summarized this idea in a kind of proposal to  
21 the funding entity. What's the name of it?

22 A The Micronutrient Initiative.

1 Q Thank you. I'm afraid I'd  
2 mispronounce that.

3 In that piece you estimated, like  
4 you said, about four to five months for  
5 writing?

6 A Uh-hum.

7 Q Okay. That's a yes, right?

8 A Yes.

9 Q I'm sorry.

10 A I'm sorry, I keep forgetting.  
11 You're so nice; I'm just keep looking at you  
12 and nodding.

13 Q And let's see, I would like to  
14 take a look at your statement on page 6. If  
15 you could, I would appreciate it.

16 The first full paragraph and the  
17 sentence beginning, "We spent," to the end of  
18 the paragraph, could you read that?

19 A "We spent months choosing and  
20 writing songs for Bon Appetit. It might have  
21 taken longer except for the fact that we've  
22 spent years honing our command of language and

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1 music, learning how to let artistic ideas  
2 percolate in our heads, so that when the time  
3 is right to develop them fully, we are not  
4 really starting completely from scratch."

5 Q So for newer or less-experienced  
6 artists, they might even require more time to  
7 put it together, quality --

8 A Absolutely. Yes.

9 Q Now I want to just briefly talk  
10 about the advisory committee. Is that a fair  
11 description of it?

12 A Sure. Yes.

13 Q Okay. I wasn't sure if it had a  
14 good title or something.

15 What was the major purpose of the  
16 committee?

17 A The advisory committee was  
18 comprised of people who are experts in the  
19 field of children's nutrition. So the purpose  
20 of getting their expertise and advice was so  
21 that we could create songs that accurately  
22 reflected both the information and the need

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1 for specific information having to do with  
2 nutrition for children.

3 Q Okay. Do you remember when you  
4 put that committee together? Roughly? Not  
5 the exact date or anything.

6 A We began contacting that committee  
7 early in the spring, probably in April of that  
8 year. Then, not unlike scheduling studio  
9 sessions with tons of musicians, we had to go  
10 back and forth quite a bit to schedule phone  
11 meetings, in-person meetings, et cetera. The  
12 committee as a whole never came together to  
13 sit in one room. We individually met with  
14 them at their places of work, spent lots of  
15 time on the phone, and email with them.

16 Q Did you write, I guess it would be  
17 called, a memorandum or a proposal January the  
18 3rd of '02 discussing this committee?

19 A Yes.

20 Q Okay, and the goals and all these  
21 things --

22 A Yes.

1 Q -- you'd laid out? Okay.

2 And you were in communication with  
3 them, it looks like March 14th you sent a  
4 memorandum to them?

5 A Yes.

6 Q Does that sound about right?

7 A If you have a copy of it, I'm sure  
8 it's right.

9 Q Oh, right. It saves trouble. I  
10 had to write down all these numbers on these  
11 things.

12 Now you produced a bunch of ideas,  
13 about 34? Thirty-five? Does that sound about  
14 right?

15 A Yes.

16 Q Okay. There was even an idea to  
17 have a scripted project, like almost like a --

18 A Yes, there was.

19 Q Okay, what would that be? What is  
20 a scripted project --

21 A We were trying to decide the best  
22 way to present this fun recording to kids, and

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1 one idea that we had was to create essentially  
2 a script, as if you would have like a piece of  
3 radio theater with characters and a script,  
4 and drama and comedy lines that would tie the  
5 songs together that would tell the story.

6 Q They even, it looks like they  
7 suggested to have like a celebrity come in to  
8 talk, maybe a Gold Medal Winner or something  
9 like that?

10 A Yes, they did.

11 Q Ultimately, in the end of May it  
12 looks like you and the gentleman from the  
13 Micro --

14 A Nutrient Initiative.

15 Q -- thank you -- corresponded and  
16 kind of narrowed down the list?

17 A Yes.

18 Q That's fair? Okay.

19 So from that point forward, then  
20 you started to, I guess, kind of finalize your  
21 list of topics and all that?

22 A Yes.

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1 Q So we're talking about four, four  
2 and a half months just to get the topics down?

3 A Yes.

4 Q Okay. Page 6, again, if you don't  
5 mind. Okay, could you read the third  
6 sentence?

7 A The third sentence?

8 Q Yes, Ma'am. Oh, sorry, the first  
9 full paragraph. Sorry.

10 A "That is not unusual."?

11 Q Yes, sorry. "For each song we  
12 recorded," those two sentences there. "For  
13 each song we" --

14 A "For each song we recorded we  
15 wrote another two that didn't make the cut.  
16 That is not unusual."

17 Q So you wrote 13 of the 16 tracks  
18 in this album, is that right?

19 A Yes.

20 Q So you wrote about 39 potential  
21 items? Just about a third of them made it in?

22 A That's about right.

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1 Q Now I'm sorry I'm making you jump  
2 around. The same paragraph, though, could you  
3 read the second sentence?

4 A "Most of those went through many  
5 revisions, some as many as 15 or 20, before we  
6 were satisfied with them."

7 Q Okay, and that's the songs that  
8 ultimately went on this thing? You went  
9 through many revisions, went through many --

10 A Even some of the songs that didn't  
11 make the final cut went through lots of  
12 revisions before we decided they weren't going  
13 to cut it.

14 Q Right, okay. Now if I understand  
15 your testimony just earlier this morning, you  
16 said you spent about 100 hours recording,  
17 doing a variety of other tasks involving kind  
18 of putting stuff on the CD, I guess, or on the  
19 tracks?

20 A The process of making the sound  
21 recordings.

22 Q Yes, Ma'am. Could you give me the

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1 list of the things that you said were included  
2 in that? I'm sorry, I want to make sure I've  
3 got the list. You had like three or four  
4 things.

5 A Oh, no, there's way more than  
6 three or four things.

7 Q Oh, excellent. Give me more.

8 A Well, the list of things,  
9 obviously, once the songs are completed, we  
10 create a list of what the arrangements are  
11 going to be, come up with arrangements,  
12 sometimes hire arrangers. We have to then  
13 contact the studio and book studio time. We  
14 have to book the musicians. We have to get  
15 the musicians all of the rehearsal materials  
16 that they're going to need in order to come  
17 into the studio familiar with the tunes.

18 Then we actually do the  
19 recordings. We re-record things that need to  
20 be re-recorded. We also in this process do  
21 all of our own recording in terms of, you  
22 know, there's lots of stuff that we do the

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1 actual recording for, not just hiring other  
2 musicians.

3 We also work with a children's  
4 chorus, and that brings in another entire  
5 dimension. We create a rehearsal CD and  
6 booklet of the lyrics, so that this fabulous  
7 children's chorus can learn all of the songs.  
8 They each, all the 25 to 30 kids, get their  
9 own copy of this. We send it home with them.  
10 Their music teacher rehearses with them. We  
11 go in and rehearse with them two or three  
12 times.

13 We have one or two more sessions  
14 of recording the kids' chorus, and then we  
15 buckle down to the hard work of doing all of  
16 the mixing.

17 Q All that within 100 hours?

18 A Well, like I said, we don't  
19 actually count all of our time, but the 100  
20 hours would account for time spent in the  
21 studio.

22 Q Okay.



1 A Time spent outside of the studio  
2 it might not account for.

3 Q How much of the time of that 100  
4 would you say was spent actually playing the  
5 songs, doing the recording itself as opposed  
6 to the other tasks that you've --

7 A Oh, about 100.

8 Q About 100 total. Okay. All  
9 right. So once you got this album complete,  
10 I guess you probably want to sell it.

11 A First I want a nap.

12 Q Fair enough. So the answer is,  
13 no, you'd like a nap. After your nap, would  
14 you like to sell your CD?

15 A Yes, I would.

16 Q Okay, and I guess there's a  
17 certain degree of promotion involved in trying  
18 to get that thing sold?

19 A Yes, there is.

20 Q All right. Now have you and Ms.  
21 Marxer engaged in any coordinated efforts,  
22 media efforts, to promote, I'll just stick

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1 with, "Bon Appetit"?

2 A Yes.

3 Q Okay. Could you give me an  
4 example?

5 A Well, our record label, Rounder  
6 Records, hires PR, a person who specializes in  
7 children's music who gets the record out to a  
8 variety of different sources. We are always  
9 available to do interviews and to talk with  
10 the media as appropriate.

11 Q According to your statement, you  
12 were on the Food Channel, got on the Today  
13 Show, even the Early Show on CBS?

14 A Actually, we were never on the  
15 Food Channel.

16 Q Oh.

17 A But two of the songs from "Bon  
18 Appetit," one of them was on CBS.

19 Q Okay, very good. I guess if you  
20 can increase your audience size, that's a very  
21 good thing in terms of promoting --

22 A You can hope to.

1 Q Yes, you can hope to. Have you  
2 used streaming at all to promote your music?

3 A No.

4 Q Have you made songs available on  
5 your website for streaming purposes?

6 A No.

7 Q Okay. Does your -- well, I'll  
8 start with this. Could you describe your  
9 website to me? Just any -- like what's the  
10 address? If I want to go to your website,  
11 where do I go to?

12 A [www.cathymarcy.com](http://www.cathymarcy.com).

13 Q Could you give sections or  
14 features that are unique to it? What kind of  
15 stuff would I find if I went to your website?

16 A I think it's a pretty standard  
17 website in that you would find biographical  
18 material. You would find information on the  
19 live programs that we offer. You would find  
20 an online store. You would find snippets of  
21 everything that we've recorded that people can  
22 listen to to decide if they want to buy it.

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1 We do not sell songs individually, so we sell  
2 our entire recordings.

3 And you would find some fun stuff.  
4 You would find how you can make a pirate ship  
5 out of two milk cartons and two straws.

6 Q What does that -- how heavy can  
7 that thing stand?

8 A How heavy?

9 Q How much weight can that take?

10 A I wouldn't sit in it, but I'd put  
11 it in the bathtub.

12 Q Okay, fair enough. But you did  
13 say you make snippets available, is what you  
14 say?

15 A Yes.

16 Q Okay. Of all your songs?

17 A Most of them.

18 Q So the person who comes on to the  
19 website just goes on and clicks and they can  
20 listen. How long are those snippets, do you  
21 think?

22 A They're between one minute and a

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1 minute and a half. They're shorter than the  
2 entire song.

3 Q All right. Now does your section  
4 have -- or sorry -- website have a link to  
5 some NPR articles, I guess?

6 A Yes, it does.

7 MR. WOOD: Okay. Now we don't  
8 need to enter that then. Well, actually, yes,  
9 let's go ahead. Sorry.

10 [Whereupon, the document  
11 was marked as Services  
12 Exhibit 76 for  
13 identification.]

14 BY MR. WOOD:

15 Q What I'm giving you is what we've  
16 marked as Exhibit 76. And I wanted to check  
17 here. The third item there on your -- do you  
18 recognize this? I'm sorry.

19 A Yes.

20 Q Okay. The third item there, Bob  
21 Edwards' interview with Cathy and Marcy, do  
22 you remember that?

1 A Yes.

2 Q Okay, that's good.

3 [Whereupon, the document  
4 was marked as Services  
5 Exhibit 77 for  
6 identification.]

7 Q I'm going to hand you what is 77,  
8 marked as Exhibit 77. I apologize for the  
9 strange formatting. I know the format is a  
10 little strange, but does this look familiar to  
11 you at all?

12 A My website's familiar to me.

13 Q Sure.

14 A I'm going to assume that when you  
15 click on that link, this is where it takes  
16 you.

17 Q Okay. I'm glad you assume that.  
18 But on the second page of this, and I guess  
19 right before your picture there with Ms.  
20 Marxer, we've got four links there. Do you  
21 see those?

22 A Yes.

1 Q Okay. Would you be surprised to  
2 learn that one can listen to the entire song  
3 on those four?

4 A No.

5 Q So an individual listener at NPR  
6 could just click on and go there and get at  
7 least four of your songs? Not "Bananas"  
8 though. I didn't put "Bananas" on there.

9 A I didn't have control of this  
10 content.

11 Q Fair enough. And you mentioned  
12 that your income, you're paid through Rounder  
13 in addition, I guess, to some other sources,  
14 but your record label, one of them is Rounder,  
15 is that right?

16 A One record label we work with is  
17 Rounder Records, yes.

18 Q Does all that money appear or come  
19 through Community Music?

20 A Yes.

21 Q Just so I'm clear, every musical  
22 dollar from whatever source, all streams flow

1 through Community Music --

2 A Correct.

3 Q -- for your purposes? Okay.

4 (Whereupon, the proceedings went  
5 into Closed Session.)

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1 MR. FREEDMAN: Your Honor, I'm  
2 sorry, but I think we're getting into the area  
3 of restricted information. I'm sorry, I  
4 should have --

5 MR. WOOD: Oh, I'm sorry. I was  
6 just going to ask, and if she didn't agree, I  
7 was going to bring stuff up.

8 MR. FREEDMAN: Her income  
9 information for Community Music we've marked  
10 restricted. It's sensitive and private  
11 information.

12 MR. WOOD: I'm sorry. I'm happy  
13 to close it if you'd like.

14 MR. FREEDMAN: If you are going to  
15 cover that, I prefer we go into closed  
16 session.

17 MR. WOOD: I'm sorry, would you  
18 like to close it now?

19 MR. FREEDMAN: If you have further  
20 questions --

21 MR. WOOD: No, we're good. We're  
22 fine. Thank you.

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1                   Actually, I'm sorry, I think I've  
2                   got about maybe one more question.   Whatever  
3                   you'd like to do.

4                   MR. FREEDMAN:   If you're going to  
5                   use restricted information, we prefer to go  
6                   into closed session.

7                   MR. WOOD:    Okay, I'm sorry.   If  
8                   you don't mind, Your Honor, I just have one  
9                   question to ask.

10                  CHIEF JUDGE SLEDGE:   If I don't  
11                  mind what?

12                  MR. WOOD:    I would just like to  
13                  ask one question regarding Ms. Fink's -- the  
14                  Community Music, Incorporated's income.  
15                  SoundExchange wants this restricted, and I'm  
16                  happy to allow them to move to close, if  
17                  they'd like to close.

18                  CHIEF JUDGE SLEDGE:   Any objection  
19                  to the motion to apply the protective order to  
20                  a question concerning the income received by  
21                  Community Music?

22                  (No response.)

1 Without objection, that motion is  
2 granted.

3 MR. WOOD: I think after all that,  
4 I think I'm probably just happy with the  
5 answer I got. So I apologize.

6 Thank you for your time, Ms. Fink.  
7 I appreciate it.

8 That's all I have, Your Honor.

9 CHIEF JUDGE SLEDGE: The question  
10 not being asked in protective order  
11 application is ended.

12 (Laughter.)

13 All right, Ms. Brown?

14 MR. FREEDMAN: Your Honor, I'm  
15 sorry. I'm sorry to interrupt. I think Ms.  
16 Fink gave an answer before I was able to get  
17 my objection out that included some restricted  
18 information. If there's a way to have the  
19 written transcript reflect that, we would so  
20 move.

21 CHIEF JUDGE SLEDGE: What answer  
22 do you want the protective order to apply?

1 MR. FREEDMAN: It was the answer  
2 in which she gave the financial figures  
3 regarding the income for Community Music  
4 immediately preceding my objection.

5 CHIEF JUDGE SLEDGE: Any objection  
6 to the motion to apply the protective order to  
7 the answer given as to the average income  
8 received from Community Music?

9 (No response.)

10 Without objection, the motion is  
11 granted.

12 Ms. Brown?

13 CROSS EXAMINATION

14 BY MS. BROWN:

15 Q Good morning, Ms. Fink.

16 A Good morning.

17 Q I'm Kris Brown on behalf of NPR,  
18 and I just have a few questions for you.

19 You're familiar with NPR, are you  
20 not?

21 A Absolutely, yes.

22 Q And you said that you operate a

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1 website, is that correct?

2 A Yes.

3 MS. BROWN: Okay. I would like to  
4 pass out Services Exhibit 78.

5 [Whereupon, the document  
6 was marked as Services  
7 Exhibit 78 for  
8 identification.]

9 BY MS. BROWN:

10 Q Ms. Fink, do you recognize this as  
11 a screenshot from your website?

12 A Yes, I do.

13 Q Okay. If you look down the  
14 lefthand column of this screenshot, about six  
15 buttons down or six links down, there's a link  
16 there called "NPR Links," correct?

17 A Yes.

18 Q Why did you put that on your  
19 website?

20 A There's some interesting  
21 interviews and links that we thought our fans  
22 might be interested in hearing.

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1 Q And, in fact, if you click on "NPR  
2 Links," it takes you to each of those  
3 interesting features that you're describing,  
4 is that correct?

5 A Where they were available. Some  
6 of them aren't available.

7 Q I'd like to draw your attention  
8 back to Services Exhibit --

9 CHIEF JUDGE SLEDGE: Ms. Brown,  
10 let me ask something.

11 When you say, "available," does  
12 that mean for which you've gotten permission  
13 to add a link?

14 THE WITNESS: No. The last one,  
15 "Patsy Montana Remembered - May 10, 1996," you  
16 can order this as a transcript from NPR, as we  
17 say, but it doesn't have an audible link. So  
18 you can't click on that, but you can click on  
19 the rest of them.

20 CHIEF JUDGE SLEDGE: The rest of  
21 them you have gotten permission from NPR Link  
22 to add to your site?

1 THE WITNESS: That's a good  
2 question. No, I don't.

3 CHIEF JUDGE SLEDGE: All right.

4 BY MS. BROWN:

5 Q To clarify, Ms. Fink, drawing your  
6 attention to Services Exhibit 78, which is the  
7 screenshot from your website, when you click  
8 on "NPR Links," it takes you to what you're  
9 referring to as Services Exhibit 76, correct?

10 A Yes.

11 Q Okay. Can you describe to me each  
12 of the links beginning with the December 12th,  
13 2003 link listed at the top, what each of  
14 these links are?

15 A Sure.

16 Q It says, "Minnesota Public Radio's  
17 Holiday Pageant."

18 A That was a live concert at the  
19 Fitzgerald Theater in Minnesota that Marcy  
20 Marxer and I were a part of, and I believe  
21 they have on their website the entire thing.

22 Q Okay. I'm sorry, go ahead.

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1 A Do you want me to just go down the  
2 line?

3 Q Sure.

4 A Bob Edwards' Interview with Cathy  
5 and Marcy on "Bon Appetit" is exactly as it  
6 says. Bob Edwards interviewed us about that  
7 CD.

8 Jackie Judd interview with Cathy  
9 and Marcy about "All Wound Up! A Family Music  
10 Party!", collaboration with Brave Combo on  
11 Morning Edition, the same thing, an interview  
12 about a specific recording.

13 Grammy songwriting, the song "Here  
14 Is the Chorus," by Bernard Carney, this was a  
15 pre-Grammy commentary on "Morning Edition."  
16 And then it mentions the "All Things  
17 Considered" where I did a eulogy for Patsy  
18 Montana, the first woman in country music to  
19 sell a million records.

20 Q So from your descriptions of each  
21 of these, it sounds like it's -- I'll  
22 characterize it and you can tell me whether

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1 you agree or disagree with the  
2 characterization, but a mix of both  
3 commentary, some news interviews, and actually  
4 some musical performances by you? Is that  
5 fair?

6 A It's a mix of those, yes.

7 Q Okay. So in providing the link  
8 from your website, which is Services Exhibit  
9 78, to these NPR links, you are drawing  
10 interested persons who may visit your site to  
11 these NPR sites, is that correct?

12 A Yes.

13 Q Okay. That contain these mix of  
14 news and performances?

15 A Yes.

16 MS. BROWN: Your Honor, I would  
17 like to move into evidence Services Exhibits  
18 76 and 78.

19 CHIEF JUDGE SLEDGE: Any objection  
20 to Exhibit 78?

21 MR. FREEDMAN: No, Your Honor.

22 [Whereupon, the document

1 marked as Services  
2 Exhibit 78 for  
3 identification was  
4 received in evidence.]

5 BY MS. BROWN:

6 Q Ms. Fink, would you agree --

7 CHIEF JUDGE SLEDGE: Ms. Brown,  
8 just a minute.

9 MS. BROWN: I'm sorry.

10 CHIEF JUDGE SLEDGE: Any objection  
11 to Exhibit 76?

12 MR. FREEDMAN: No, Your Honor.

13 CHIEF JUDGE SLEDGE: Without  
14 objection, Exhibit 76 is admitted.

15 MS. BROWN: Thank you, Your Honor.

16 [Whereupon, the document  
17 marked as Services  
18 Exhibit 76 for  
19 identification was  
20 received in evidence.]

21 BY MS. BROWN:

22 Q Ms. Fink, you would agree, would

1 you not, that performing on NPR, providing  
2 commentaries and exposing the NPR audience to  
3 your music has the ability to introduce your  
4 music to new fans?

5 A Yes.

6 Q Who would potentially purchase  
7 your music?

8 A Yes.

9 Q In fact, you would not link to the  
10 NPR website or seek to have your work on NPR  
11 unless you believed that there was benefit  
12 from doing so, would you?

13 A No.

14 Q And based on your work with NPR,  
15 you are familiar with the fact that NPR is a  
16 non-commercial, non-profit entity, correct?

17 A Well, I have a different view on  
18 that. Officially, I guess that's the case.

19 Q Okay. And that it's not a  
20 webcaster that founded its business on your  
21 music, is that correct?

22 A It is certainly a webcaster that

1 uses my music to create some of its  
2 programming. It didn't find it on my  
3 personal music, but it is well-founded on the  
4 music of tons of musicians who are providing  
5 them with lots of their programming.

6 Q And news and commentary such as  
7 you cited?

8 A Yes.

9 Q Have you visited the NPR  
10 website --

11 A Yes.

12 Q -- or NPR member stations'  
13 websites? Don't you think the fact that NPR  
14 invests significant time and effort in  
15 exposing the public to music that you would  
16 not otherwise find on commercial radio is an  
17 important benefit to artists like yourself?

18 A Yes.

19 Q Are you aware that NPR puts  
20 substantial time and effort into featuring  
21 artists like yourself as part of its  
22 programming to present the artist material in

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1 a meaningful way and to give context to the  
2 artist's work through interviews with "Morning  
3 Edition," reviews of CDs, and other content?

4 A I'm not actually aware of what  
5 NPR's effort in that line is.

6 MS. BROWN: May I just have one  
7 moment, Your Honor?

8 CHIEF JUDGE SLEDGE: Yes, Ma'am.

9 MS. BROWN: No further questions.  
10 Thank you.

11 CHIEF JUDGE SLEDGE: Any  
12 questions, Mr. Freundlich?

13 MR. FREUNDLICH: I have a few  
14 questions. I see we're at 11 o'clock. Do you  
15 want me just to continue through?

16 CHIEF JUDGE SLEDGE: No, sir.  
17 Thank you for bringing that to my attention.  
18 This would be a good time to take a morning  
19 recess. We'll recess for 10 minutes.

20 (Whereupon, the foregoing matter  
21 went off the record at 11:01 a.m. and went  
22 back on the record at 11:15 a.m.)

CROSS EXAMINATION

BY MR. FREUNDLICH:

Q Good morning, Ms. Fink.

A Good morning.

Q I am Ken Freundlich. I represent  
Royalty Logic, Inc. Do you know about my  
client?

A I have heard of your client.

Q Do you know what my client does?

A Not exactly.

Q Are you aware that my client is  
here in this proceeding to establish itself as  
an alternative collective for your website  
royalties?

A Yes, I am.

Q Now you have joined SoundExchange,  
is that correct?

A Yes, I have.

Q When did you join SoundExchange?

A I don't remember exactly.

Q How did you learn about  
SoundExchange?

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1 A I learned about SoundExchange from  
2 John Simson.

3 Q Can you describe those  
4 conversations?

5 A No, because they're such a long  
6 time ago. I just remember John telling me  
7 about a new organization that was going to  
8 collect these kinds of royalties and  
9 suggesting that I learn about it.

10 Q Do you have a manager?

11 A No. Me.

12 Q So you're the only person on your  
13 behalf who would have had those conversations  
14 with John Simson?

15 A Yes.

16 Q Okay. Over what period of time  
17 did that occur?

18 A I can't remember.

19 Q Were there many conversations?

20 A No.

21 Q Just one?

22 A I can't remember.

1 Q Okay. Was it more than five?

2 A I can't remember.

3 Q Okay. On page 14 of your written  
4 statement you have said that, "We" -- "We"  
5 meaning, I guess, you and Marcy --

6 A Yes.

7 Q -- "have chosen SoundExchange as  
8 the agent to collect and pay royalties." I  
9 believe you testified this morning that you  
10 selected SoundExchange to collect and pay your  
11 royalties in this context? Is that true?

12 A Yes.

13 Q And when you say chose them, what  
14 was the choice?

15 A We made a choice, when  
16 SoundExchange sent us information, about  
17 whether or not we wanted to sign up.

18 Q Did they tell you that there were  
19 any other alternatives?

20 A No.

21 Q Did you know anything at that time  
22 about this stream of royalties?



1           A       I was aware that they're in new  
2 media formats going to be plenty of new  
3 streams of royalties and not aware of where we  
4 would find our income through them.

5           Q       So you chose a collective instead  
6 to help you to find that income?

7           A       Yes.

8           Q       Did you have, in fact, a choice of  
9 collectives at that time?

10          A       I did not do any further research.

11          Q       Okay.    So when you say you've  
12 chosen SoundExchange, it means you didn't  
13 really have a choice, did you?  I mean it was  
14 either SoundExchange or nothing?

15                   CHIEF JUDGE SLEDGE:   Which is a  
16 choice.

17                   BY MR. FREUNDLICH:

18          Q       Okay,    was    that    your    choice?  
19 SoundExchange or nothing?

20          A       I chose SoundExchange.

21          Q       Okay.    Now you don't record on a  
22 major label, do you, Ms. Fink?

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1 A It depends on your definition of  
2 major.

3 Q Is Rounder Records a major label?

4 A No.

5 Q Have you ever recorded on any  
6 labels other than Rounder Records?

7 A Yes.

8 Q And which ones would those be?

9 A I've recorded on Sugar Hill  
10 Records. I've recorded on Rooster Records.  
11 I've recorded on A&M Records. I've recorded  
12 on High Windy Audio and I've recorded on  
13 Community Music.

14 Q Was A&M Records a complete Cathy  
15 Fink album?

16 A It was a Cathy -- it was three  
17 complete Cathy Fink and Marcy Marxer albums.

18 Q In connection with a compilation?

19 A Not to my knowledge.

20 Q Okay. Are you aware that  
21 SoundExchange has a limited number of  
22 employees?

1 A Every company has a limited number  
2 of employees.

3 Q Do you know --

4 A Limited to the number of  
5 employees.

6 Q Do you know how many employees  
7 SoundExchange has?

8 A No, I don't.

9 Q Okay. Are you aware that they  
10 represent all the major labels?

11 A Yes.

12 Q Now you're a songwriter also?

13 A Yes.

14 Q Is that correct, Ms. Fink? And  
15 are you affiliated with a performing rights  
16 organization?

17 A I am.

18 Q And which one is that?

19 A ASCAP.

20 Q Okay. Have you ever been  
21 affiliated with either BMI or SESAC?

22 A No.

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1 Q Are you aware that you have a  
2 choice to affiliate with any one of those  
3 three?

4 A Yes, but not because they made me  
5 aware.

6 Q How did you find out that they had  
7 a choice? How did you find out that you had  
8 a choice, I should say?

9 A Through industry trades.

10 Q Are you aware that you have a  
11 choice of collecting societies in connection  
12 with your webcasting royalties?

13 A Now I am.

14 Q Did you just find out from me?

15 A No, I was, as I mentioned earlier,  
16 somewhat aware of your organization.

17 Q When you say, "now I am," can you  
18 tell us when the now was? When did you  
19 become --

20 A Not exactly.

21 Q Was it within the last six months?

22 A Probably.

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1 Q In preparing for your testimony  
2 here?

3 A I don't know that it's related to  
4 the testimony.

5 Q Okay, but you didn't know about  
6 it, say, a year ago?

7 A No.

8 Q You didn't know about it when you  
9 joined SoundExchange, did you?

10 A No.

11 Q Are you aware that SESAC is one of  
12 the competing performing rights organizations  
13 that has offered advances to artists if they  
14 want to become a member of SESAC, for  
15 instance, and switch from BMI or ASCAP?

16 A No.

17 Q You hadn't heard that Bob Dylan,  
18 for instance, got a big advance to move his  
19 catalog over to SESAC?

20 A No.

21 Q Okay. Would you be interested in  
22 such an advance if, in fact, it was offered to

1 you for your performing rights? Would you  
2 consider switching?

3 A I'd check the information, but  
4 that wouldn't be necessarily a factor that  
5 would influence me.

6 Q But it is something you would  
7 investigate, isn't it?

8 A Possibly.

9 Q What if there were -- oh, go  
10 ahead. I'm sorry.

11 A An advance doesn't mean you're  
12 going to get more income. It just means that  
13 they're going to advance you the income. So  
14 there's a lot of research to be done there.

15 Q Okay. But you didn't do any of  
16 that research when you decided to join  
17 SoundExchange, did you?

18 A At that time, no.

19 Q Because you weren't aware there  
20 was an alternative?

21 A Correct. It seems like somebody  
22 -- sorry.

1 Q I have to ask the questions.

2 A Go ahead.

3 Q What if after today's hearing  
4 SoundExchange was to make an announcement, for  
5 instance, that they're going to increase their  
6 costs and they're going to deduct those costs  
7 from all the artists' royalties, including  
8 yours? Would you want to have anything to say  
9 about that?

10 A I don't know.

11 Q Do you know whether or not  
12 SoundExchange, in fact, deducts any costs from  
13 the royalties they pay to you?

14 A I suspect they do.

15 Q Do you have any idea what those  
16 costs are?

17 A No.

18 Q Have you ever done anything to  
19 investigate those costs?

20 A No.

21 Q What if an alternative collective,  
22 for instance, my client, Royalty Logic, was

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1 available and that they, in fact, didn't  
2 deduct the same amount of costs from the  
3 royalties they were going to pay you than  
4 SoundExchange? Wouldn't that be a factor in  
5 your choice between collectives, Ms. Fink?  
6 You would end up getting more net dollars, for  
7 instance.

8 A It's not proof that I would get  
9 more net dollars.

10 Q But wouldn't you, indeed, want to  
11 investigate that?

12 A I might investigate it.

13 Q You would agree, would you not,  
14 that generally it would be better for you to  
15 have a choice of collectives in this  
16 situation, wouldn't you?

17 A Not necessarily.

18 Q Why not?

19 A I'm not convinced that the choice  
20 of phone companies has helped us out.

21 Q So you don't think that  
22 competition in this area like the competition



1 in the performing rights organizations area  
2 would be beneficial to you?

3 A I don't actually find that the  
4 competition in the performing rights area has  
5 benefitted me personally. So I might, you  
6 know, I'm willing to pay attention to  
7 information and investigate, but I'm not  
8 willing to say on the front end that that's  
9 going to result in something better, and in  
10 the phone companies I don't think it did.

11 Q Now you testified earlier that  
12 when the Buy button was pressed that -- let me  
13 rephrase the question.

14 You said something about how  
15 Rounder Records, who owns the masters on the  
16 record that that Buy button produced a sale  
17 for, has not figured out how to stream the  
18 money down to artists. What did you mean by  
19 that?

20 A As all of these new revenue  
21 streams happen, the record labels have to  
22 figure out how they're going to incorporate

1       them into their bookkeeping, reporting, and  
2       payment to artists.     Sometimes that takes  
3       longer than your most immediate statement.

4               Q       So you haven't seen any royalties  
5       from those digital sales yet?

6               A       I'm not going to say I haven't  
7       seen any.   My royalty statements are about as  
8       thick as my taxes.   So when I get them, I have  
9       to spend a lot of time going through them to  
10      see what is and isn't there.

11              Q       If it were offered to you, would  
12      you like to have a collective that would  
13      investigate those royalties to see if, in  
14      fact, they're being paid properly?

15              A       Possibly.

16              Q       Have you ever asked anyone at  
17      SoundExchange to look into it for you?

18              A       I     have,     in     fact,     asked  
19      SoundExchange to look into some royalty issues  
20      for me.

21              Q       And have they done anything for  
22      you?

1 A Yes, they have.

2 Q Can you describe that?

3 A They did some research to find  
4 that, in fact, there were some recordings that  
5 I hadn't been paid on, and they retroactively  
6 took care of that.

7 Q And you're talking about  
8 recordings that you haven't been paid on for  
9 downloads?

10 A I don't remember what the  
11 circumstances were.

12 Q Well, was it involving webcasting?

13 A I don't remember what the  
14 circumstances were.

15 Q Okay. Do you remember who you  
16 spoke to at SoundExchange?

17 A I directed my initial inquiry to  
18 John Simson, who passed it on to whoever at  
19 SoundExchange dealt with it.

20 MR. FREUNDLICH: I have nothing  
21 further.

22 CHIEF JUDGE SLEDGE: Any other

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1 party wish to cross examine Ms. Fink?

2 (No response.)

3 Mr. Freedman, any further direct?

4 MR. FREEDMAN: I have one  
5 question, Your Honor.

6 CHIEF JUDGE SLEDGE: All right,  
7 sir.

8 REDIRECT EXAMINATION

9 BY MR. FREEDMAN:

10 Q Ms. Fink, in your cross  
11 examination you were asked about NPR being a  
12 non-profit, and you said you had a different  
13 view. Can you explain what you meant?

14 A Well, although -- it's not that I  
15 have a different view about them being non-  
16 profit; I have a different view about whether  
17 or not they're a commercial station at this  
18 point because I feel that NPR has morphed into  
19 creating credits for funders that essentially  
20 sound like commercials to me. So, you know,  
21 the difference between a jingle commercial and  
22 a minute and a half telling you the work of

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1 whoever it is that is funding their  
2 programming, and their website and their phone  
3 number and what exactly they offer you, isn't  
4 that different to me.

5 MR. FREEDMAN: Nothing further,  
6 Your Honor.

7 CHIEF JUDGE SLEDGE: That  
8 completes the questions of Ms. Fink. Thank  
9 you, Ma'am.

10 THE WITNESS: Thank you.

11 (Witness excused.)

12 CHIEF JUDGE SLEDGE: Mr. Freedman,  
13 your next witness?

14 MR. FREEDMAN: Yes, Your Honor,  
15 Jonatha Brooke will be our next witness, and  
16 we're getting her from the hallway.

17 CHIEF JUDGE SLEDGE: Ms. Brooke,  
18 before you seat, would you please raise your  
19 right hand?

20 WHEREUPON,

21 JONATHA BROOKE

22 was called as a witness by Counsel for the

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1 SoundExchange and, having been first duly  
2 sworn, assumed the witness stand, was examined  
3 and testified as follows:

4 CHIEF JUDGE SLEDGE: Thank you.  
5 Be seated.

6 DIRECT EXAMINATION

7 BY MR. FREEDMAN:

8 Q Good morning.

9 A Hi.

10 Q Could you please state your name  
11 for the record?

12 A My name is Jonatha Brooke.

13 Q Where do you live, Ms. Brooke?

14 A I live in New York City.

15 Q What is your profession?

16 A I am a musician, singer,  
17 songwriter, guitar player, piano player,  
18 record producer, record label owner.

19 Q You mentioned a couple of  
20 instruments in there. What instruments do you  
21 play?

22 A I mostly play guitar and piano,

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1 and I sing.

2 Q How old were you when you started  
3 playing the guitar?

4 A I got a guitar for Christmas from  
5 my father when I was 12.

6 Q And how about the piano, when did  
7 you start playing?

8 A I was six when I started piano  
9 lessons.

10 Q And you also mentioned you sing.  
11 When did you start singing?

12 A I think I have always been  
13 singing.

14 Q Can you describe for the judges  
15 here today how you got your start as a  
16 musician?

17 A Well, in seventh grade I had a  
18 rock band that my science teacher started. It  
19 was called Science Function, and we had a big  
20 hit at our school which was, "She's a Fool to  
21 be Cool."

22 But after that, I didn't start

1 writing songs until college, and that was when  
2 I really realized that this was something that  
3 was my calling.

4 Q Can you describe for us what  
5 happened in college to start you career then  
6 as a musician?

7 A I took a songwriting course and I  
8 got an A. I then auditioned for a gig at a  
9 local club. I did an open mike night and sang  
10 three songs and was invited back for a full  
11 evening of my own, and that was my first gig  
12 in North Hampton, Massachusetts.

13 Q And how did that first gig go?

14 A It went very, very well. I was  
15 terrified, but it was quite a success.

16 Q After you played that first show,  
17 what happened next for your career?

18 A I, basically, for the rest of  
19 college kept getting gigs in the area and  
20 playing around the different schools in  
21 western Massachusetts and just working hard on  
22 trying to find venues to perform at and write



1 more songs.

2 Q Did you continue with your musical  
3 career after college?

4 A I did. I was also a modern  
5 dancer. So I was trying to juggle both  
6 careers. I was an English major in college,  
7 but I went back to modern dance afterwards and  
8 I did gigs in New York and Boston and wherever  
9 I could find a gig. But I also had to work  
10 many other jobs to support my arts.

11 Q At that time how were you finding  
12 gigs? When you say you found gigs, how did  
13 you do that?

14 A Well, I made a demo tape. I sent  
15 it to every club, radio station person that I  
16 could find. I sent out little pictures and  
17 resumes, and I think I had my father, who was  
18 a journalist, write a very compelling blurb  
19 about how fabulous I was, and that's how I got  
20 gigs.

21 Q Where were you at this time?

22 A I was living in Boston.

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1 Q At that time was playing gigs --  
2 were you able to support yourself playing  
3 gigs?

4 A I was not able to support myself  
5 playing gigs at that point, no.

6 Q So how were you supporting  
7 yourself?

8 A I was a cleaning lady. I was a  
9 waitress. I was a nanny. I edited indexes  
10 for Houghton Mifflin textbook division, and I  
11 painted houses.

12 Q How long did this period in Boston  
13 last, approximately, of playing gigs and doing  
14 these other jobs?

15 A From after college -- I graduated  
16 in 1985 from college, and it wasn't until  
17 about '92 or '93 that I actually was starting  
18 to make a living solely by my music.

19 Q When did you release your first  
20 album?

21 A '91 was my first album on Elektra  
22 Records.

1 Q What was that album called?

2 A "Grace and Gravity."

3 Q How did you get a deal with  
4 Elektra Records?

5 A I was actually performing as a  
6 dancer and met a record producer who was I  
7 guess a fan of the arts, and he became a fan  
8 of mine. I actually had a demo tape with me  
9 and I handed it to him. He ended up working  
10 in New York at Elektra Records with Tommy  
11 LiPuma, who fell in love with this demo,  
12 called me up and wanted to make a record deal.

13 Q Who's Tommy LiPuma?

14 A Tommy LiPuma is a very successful  
15 producer. His biggest successes have been  
16 Diana Krall, George Benson. I can't think of  
17 who else right now, but he's one of the most  
18 respected music guys, producers.

19 Q When you released that album, did  
20 it get any media coverage?

21 A "Grace and Gravity" didn't get a  
22 lot of coverage. It was basically groundwork

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1 for releasing the next record, which was  
2 called "Angel in the House."

3 Q Do you remember when that was  
4 released?

5 A I believe that was '93.

6 Q Did that album get any media  
7 coverage?

8 A That album did pretty well. It  
9 was right around the time that the AAA radio  
10 format was coming into existence, and Elektra  
11 actually did a pretty good job of promoting  
12 the record and helping me tour, helping me  
13 with tour support. It had some success with  
14 AAA radio.

15 Q Now since that time, have you  
16 released other albums?

17 A I have.

18 Q How many albums in all?

19 A Five more.

20 Q And have you released them all  
21 with Elektra?

22 A No. After Elektra and I parted

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1 ways, I had a record deal with Universal and  
2 had two records on Universal Records.

3 Q And after that?

4 A After that, I started my own  
5 label, Bad Dog Records, and I have three  
6 records that I have released on my own on Bad  
7 Dog Records.

8 Q When did you start Bad Dog  
9 Records?

10 A That was '98.

11 Q And I should have asked you this  
12 earlier: How would you characterize the kind  
13 of music that you play?

14 A I play, I write, and I play and I  
15 -- I try to write really good pop songs but  
16 not dumb ones. I try to write literate,  
17 intelligent, crafted pop songs.

18 Q How have your albums been received  
19 in the press?

20 A I've always done well in the  
21 press. I am somewhat of a -- I've done well  
22 with the press. The journalists usually like

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1 what I do.

2 Q You mentioned Bad Dog Records.

3 Who operates Bad Dog Records?

4 A I do.

5 Q And whose music does it release?

6 A Right now Bad Dog Records is only  
7 releasing Jonatha Brooke music.

8 (Laughter.)

9 We can't really afford other  
10 artists. I would love to at some point  
11 expand, but for now we're having trouble  
12 keeping up with me.

13 Q Do you go on tour?

14 A I do.

15 Q How often do you play live shows?

16 A Probably anywhere from 50 to 75  
17 shows a year?

18 Q In geographic terms, where do you  
19 tour?

20 A I tour all over the states. I  
21 have toured in Europe pretty extensively in  
22 the last few years as well, wherever I can get

1 a gig.

2 Q And when you're playing in the  
3 states, what kinds of venues are you playing?

4 A In the states it's anywhere from a  
5 small club, 250 to 300 people, to a 1500-seat  
6 theater in my better cities.

7 Q What are your better cities?

8 A Philly is big. Boston is big,  
9 hometown. The West Coast is good. San  
10 Francisco, LA, Portland, Seattle. D.C. is  
11 pretty good, actually. East Coast, West  
12 Coast, and a few clumps in the middle.

13 Q When you tour, are there costs  
14 associated with touring?

15 A There are huge costs associated  
16 with touring.

17 Q What are some of those costs?

18 A Well, I have to pay for airfare  
19 and hotels. I have to pay for my band  
20 salaries, insurance, rental cars, gear rental.  
21 I have to feed everybody. It's a huge  
22 expense.

1 Q And who covers those costs?

2 A I pay those costs.

3 Q You mentioned a band. Do you play  
4 with a band when you tour?

5 A I try to play with my band as much  
6 as I can if the gigs afford it. Some of the  
7 better-paying gigs I'm able to bring everybody  
8 and afford it. Much of the time I need to go  
9 out and play solo, so that I can bring home  
10 something.

11 Q What is the difference? Why does  
12 it cost more to tour with a band?

13 A All of the hotels and airfares and  
14 salaries and food. They eat a lot.

15 (Laughter.)

16 Q Do you get paid when you tour?

17 A I do.

18 Q Do those payments that you earn  
19 for touring cover the costs associated with  
20 touring?

21 A Sometimes they cover the costs and  
22 sometimes they don't. I'm lucky sometimes to

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1 come home with a little bit extra, and usually  
2 that goes back into Bad Dog Records to pay  
3 whatever was still unpaid from the last month.

4 Q You mentioned in your written  
5 testimony touring in Europe with Joe Cocker.

6 A Uh-hum.

7 Q Who is Joe Cocker?

8 A Joe Cocker is a fabulous singer,  
9 artist, British performer. I'm a huge fan.

10 Q And when did you tour with him?

11 A I toured with Joe from last May  
12 off and on through October.

13 Q Where was that?

14 A Mostly in Europe. We toured a lot  
15 in France, Germany, Austria, Switzerland,  
16 Denmark, Holland, a couple of Croatian gigs,  
17 Slovenia.

18 Q What kind of venues do you play  
19 when you're touring with him?

20 A We were playing in anywhere from a  
21 6,000-seat arena to a 10-12,000 seat arena.

22 Q So bigger than when you tour by

1 yourself here in the states?

2 A Way bigger than when I tour by  
3 myself.

4 Q What is that experience like,  
5 playing a bigger venue?

6 A It's awesome. It's terrifying  
7 because I was alone with my guitar on stage in  
8 front of 10,000 Parisians trying to speak  
9 French, but it was a great experience. Oddly  
10 enough, our audiences, his audience really  
11 appreciated what I did, and it was a great  
12 experience.

13 Q Do you receive equal billing on  
14 the tour when you're with him?

15 A No. I don't think I received any  
16 billing at all. I was kind of the surprise  
17 chick with a guitar who came out and tried to  
18 sing for 30 minutes, but usually it went  
19 pretty well.

20 Q Do you open for him?

21 A I did. I was the opening act.

22 Q And are you paid when you play

1 with him?

2 A Sometimes I'm paid; sometimes I  
3 wasn't paid, anywhere from 300 bucks to 500  
4 bucks a night.

5 Q When you're touring with Joe  
6 Cocker in Europe, did you have expenses?

7 A I had a lot of expenses. I was  
8 paying my own airfare, my own inter-European  
9 flights. I was paying for rental cars and  
10 hotels and all of my own food.

11 Q At the end of each show in Europe,  
12 how did you get from one venue to the next  
13 one?

14 A I would usually drive my rental  
15 car with my map and my bottled water and try  
16 to find the next city.

17 I also had to pay the lighting guy  
18 and the sound engineer and the monitor  
19 engineer and the guitar tech every night  
20 because they were helping me do my show. So  
21 I usually would -- any money I got paid  
22 certainly went back into affording to do the

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1 tour.

2 Q When you're on tour do you have  
3 the opportunity to sell CDs?

4 A I do. Usually, I would rush off  
5 the stage and run out to the concessions hall  
6 and stand there and hope that people would  
7 come buy my CD.

8 Q And do they?

9 A Sometimes, yes.

10 Q How many do you sell at a show?

11 A Well, in Croatia they were more  
12 interested in beer (laughter), but I would  
13 sell anywhere from 12 to 80 CDs sometimes. On  
14 the good cities I would sell 70 or 80.

15 Q In your written direct statement,  
16 one of the things you said is that there's no  
17 formula for building a recording career. What  
18 did you mean by that?

19 A I mean that it's so elusive to  
20 make a living doing what I do. It's any  
21 number of things that get you through the  
22 month. You work your butt off. You tour.

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1 You make a record. You release it. You hope  
2 to get radio airplay. You hope that the ASCAP  
3 checks can supplement some of your income.

4 I've been lucky enough to write  
5 songs for Disney. I've written three songs  
6 for Disney now, and that has helped a great  
7 deal.

8 But it's just kind of a mystery  
9 how it comes together in the end.

10 Q I'd like to ask you a few  
11 questions about the process of creating a  
12 sound recording, which you discuss in your  
13 written testimony. What is the first step in  
14 creating a sound recording?

15 A Hopefully, you have a bunch of  
16 songs that you're in love with, and then you  
17 book some studio time and you call your band  
18 and hope that they're free, and set up a  
19 recording session to start putting things down  
20 and seeing if the songs -- it's like that  
21 David Letterman show, "Will It Float?"

22 Q Are there other musicians involved

1 in your recording sessions?

2 A Yes. Usually, this time -- well,  
3 I just finished a new record. My band is  
4 involved in this one. But I also sometimes  
5 call other musicians that I think would be  
6 amazing for a specific task, like Mitchell  
7 Froom, or Joe Sample played piano on one of my  
8 records. Marcus Miller played the bass on one  
9 record. So the song will tell you perhaps  
10 what it needs.

11 Q On your most recent albums today,  
12 how many different musicians perform on that  
13 album?

14 A Oh, gosh, there are probably 15 or  
15 20 different musicians.

16 Q In addition to the musicians, are  
17 there other people who are involved with  
18 creating the sound recording?

19 A Yes. You have to pay for the  
20 studio. There's an engineer. There's usually  
21 an assistant engineer. There's rental gear.  
22 There's any number of people that are involved

1 down to the people who make you lunch every  
2 day.

3 Q Who is paying for the studio time?

4 A I pay for the studio time.

5 Q And the musicians?

6 A I pay the musicians.

7 Q And the other people you  
8 mentioned, including the sound engineers, who  
9 pays for those?

10 A I have to pay for all those costs.

11 Q So you do a recording session.  
12 How do you go from doing a recording session  
13 to having a finished product?

14 A Well, when you have your bunch of  
15 songs and you're happy with the arrangements  
16 and who played what, then you need to mix  
17 them, which involves just making the final  
18 decisions about what your sonic landscape will  
19 be.

20 Q After you mix the songs, what is  
21 the next step?

22 A Then you need to master the songs.

1 That involves the final EQing and levels and  
2 making sure that it makes sense as a package  
3 of sound.

4 Q When the mastering is done, what  
5 do you have?

6 A You have an ugly CD master ref  
7 that you listen to.

8 Q So what is the next thing you do  
9 in the process of creating an album?

10 A Then you need to create a package  
11 that will, hopefully, attract people to it,  
12 attract their attention. You need an image.  
13 You need a CD booklet. You need to find  
14 images that will be part of the promotion of  
15 the record. So you need a photographer. You  
16 need photos. You need a designer to create  
17 something that you can put your CD in and send  
18 it out into the world.

19 Q Are there costs associated with  
20 creating that physical product?

21 A Yes, you have to pay the  
22 photographer and the stylist and the makeup

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1 person and the designer, and then you have to  
2 manufacture it. So you have to pay the  
3 manufacturer for however many you choose to  
4 press up, 30,000, 50,000, depending on your  
5 enthusiasm.

6 Then you have to market the thing.  
7 It's not going to just get out there by  
8 itself. So you have to hire a publicist who  
9 will let it be known that you have a new  
10 product on the market and that journalists  
11 should listen to it and review it, and that  
12 there will be a tour.

13 Then you send it to radio and you  
14 send it to press. You hope that that  
15 generates some kind of momentum that will help  
16 you do your thing.

17 Q All of the costs you just  
18 described, who pays for those?

19 A I have to pay for all of that.

20 Q How do you afford all of these  
21 costs?

22 A I don't. My credit cards are

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1 completely maxed. I'm pretty much in debt,  
2 but I can't complain. I'm enjoying it. I'm  
3 actually at a great point in my career. I  
4 just finished two new records that I'm  
5 completely in love with. So I gamble every  
6 day.

7 Q You refer to yourself in your  
8 written statement as a mid-level artist. What  
9 do you mean by that?

10 A I think the bulk of people who do  
11 what I do are struggling every day to make  
12 ends meet and figure out how to keep doing  
13 what we would love, because I'm not really  
14 qualified to do anything else at this point.

15 So I think a mid-level artist  
16 who's just piecing it together from all of the  
17 different income streams. You know, there's  
18 ASCAP. Sometimes ASCAP saves my life. Once  
19 in a while I'll get a SoundExchange check, and  
20 I note they're getting bigger every time, and  
21 it saves my life. It's just I never know kind  
22 of week to week what will come in that might

1 make the difference.

2 Q Have you ever recorded an album  
3 that was a commercial hit?

4 A I have not had that luxury.

5 Q But you said you consider yourself  
6 a recording artist?

7 A I do.

8 Q I'm sorry, excuse me. A  
9 successful artist?

10 A I do. I do consider myself  
11 successful. I don't have to clean houses  
12 anymore. I am able to tour with my band. I'm  
13 able to write songs and record and release  
14 records, even though I'm not raking it in.

15 Q You may have mentioned this  
16 earlier, so forgive me, but how long did it  
17 take until you were able to support yourself  
18 with your music?

19 A I think it was about eight years.

20 Q Do you earn income as a musician?

21 A I do.

22 Q What are the ways in which you

1 earn income?

2 A I get income from record sales. I  
3 get income from ASCAP. I get income from  
4 SoundExchange. I write songs, thank goodness,  
5 for Disney. I've written a couple of songs  
6 for other pop artists recently, and I tour,  
7 although that doesn't really bring me in too  
8 much.

9 Q Are you able to rely on any one of  
10 those sources of income to support you?

11 A No. No, no one alone would  
12 sustain my career.

13 Q You mentioned you receive payments  
14 from SoundExchange. Are those payments  
15 important to you?

16 A They are.

17 Q And can you explain why?

18 A You just never know when it's  
19 going to be down to the last penny and the  
20 credit cards won't run anymore. You get \$400  
21 and that's the difference that week between  
22 groceries and not. I mean it sounds so

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1       maudlin, but there are times when it really is  
2       that serious.

3                   MR. FREEDMAN:       I have nothing  
4       further, Your Honor.

5                   CHIEF     JUDGE     SLEDGE:       Mr.  
6       Steinthal?

7                   MR. STEINTHAL:    Your Honor, Mr.  
8       Larson, Todd Larson, from our office is going  
9       to handle this cross examination.

10                  MR. LARSON:    Thank you.    If I  
11       could just have one second, Your Honor?

12                               CROSS EXAMINATION

13                               BY MR. LARSON:

14                  Q       Hello, Ms. Brooke.   How are you  
15       today?

16                  A       Hi.    I'm well, thanks.   How are  
17       you?

18                  Q       I'm doing well.   My name is Todd  
19       Larson, and I'm here representing DiMA and  
20       DiMA's members, including Yahoo, AOL,  
21       Microsoft, Live365.

22                               Let me start by asking you, are

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1 you familiar that there's a statute that  
2 guides the Board in their decisionmaking in  
3 this proceeding?

4 A Uh-hum.

5 Q And you're aware that certain  
6 services follow requirements in the statute to  
7 either qualify or not qualify for the  
8 statutory license, is that right?

9 A Yes.

10 Q Okay. Are you familiar with what  
11 services actually do qualify for the license?

12 A I believe that it is the non-  
13 interactive streaming on the internet.

14 Q So, like my clients again that I  
15 mentioned before, Yahoo, AOL --

16 A That's what qualifies.

17 Q Okay. We don't have your  
18 statement handed out already.

19 MR. LARSON: I'd like to mark for  
20 identification Ms. Brooke's statement. I  
21 believe this is Services Exhibit 79.

22 [Whereupon, the document

1 was marked as Services  
2 Exhibit 79 for  
3 identification.]

4 BY MR. LARSON:

5 Q Okay, now, Ms. Brooke, could you  
6 turn to page 8 of your statement? On page 8,  
7 starting in the second paragraph, you describe  
8 there an experiment, as you call it, that you  
9 undertook for a year and a half of making  
10 songs of yours available on your website,  
11 correct?

12 A Yes, I did. Sorry.

13 Q That's right, could you just  
14 answer audibly?

15 A I have to answer.

16 MR. LARSON: Just so we have an  
17 idea, a little bit better idea of what we're  
18 talking about there, I'd like to mark another  
19 exhibit. This would be Services Exhibit 80.  
20 These are some screenshots from Ms. Brooke's  
21 website.

22 [Whereupon, the document

1 was marked as Services  
2 Exhibit 80 for  
3 identification.]

4 THE WITNESS: Thanks.

5 BY MR. LARSON:

6 Q Ms. Brooke, does this look  
7 familiar to you?

8 A Yes.

9 Q It's your website?

10 A This is my website.

11 Q In fact, this is the music, the  
12 first page of this is the music page of your  
13 website?

14 A I believe it is, yes.

15 Q Okay. So just so it's clear, you  
16 get to there from your home page by clicking  
17 the Music button up in the upper left?

18 A Yes.

19 Q And you see that on the right you  
20 have a section called "Releases"?

21 A Yes.

22 Q Under that, that's each of your

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1 albums that's listed there, correct?

2 A Yes.

3 Q Okay. If you hit the More link  
4 under any one of those album titles, then it  
5 takes you to a page for that particular album,  
6 is that right?

7 A Yes.

8 Q So if you'll turn to page 3, now  
9 that's -- if I were to hit the More link under  
10 the "Back to the Circus" or "Back in the  
11 Circus" -- excuse me -- it would take me to  
12 this page, is that correct?

13 A Yes.

14 Q Now looking at this page, to the  
15 right you've got the tracks listed on the  
16 right that are the tracks that are on that  
17 particular record?

18 A Right.

19 Q And so you make these songs  
20 available essentially on demand to --

21 A To stream. I did.

22 Q Okay. So a user, basically, can

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1 click on the Listen link under one of these  
2 song titles and hear that?

3 A Yes, they can, yes.

4 Q At the moment that they click on  
5 it, it comes right up and they can listen to  
6 it, right?

7 A Yes.

8 Q Okay. Now that's different than  
9 the functionality of the webcasters that  
10 qualify for the statutory license, is it not?

11 A I believe it is.

12 Q Right.

13 A It was my choice to do that.

14 Q Right. In fact, if a webcaster,  
15 like one of my clients, were to offer an on-  
16 demand link like this, that would not fall  
17 under the statutory license, right?

18 A Can you repeat the question?

19 Q Yes. If a webcaster were to offer  
20 on-demand links like this where you could  
21 listen to the song right when you click the  
22 link, they wouldn't qualify for the statutory

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1 licenses that we're talking about in this  
2 proceeding, is that right?

3 A They wouldn't qualify? I think  
4 that they should pay.

5 Q No, I don't mean they wouldn't  
6 pay.

7 A Oh.

8 Q In fact, they wouldn't be able to  
9 take advantage of the statutory license,  
10 right?

11 A Okay.

12 Q Is that your understanding?

13 A Right. I think so.

14 Q Now with the webcasters, again  
15 like Yahoo or AOL or others that are taking  
16 part in this proceeding, essentially, you tune  
17 in to a given channel and then you listen to  
18 what happens to be playing on that channel at  
19 that time.

20 A Right.

21 Q Is that your understanding?

22 A That's my understanding.

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1 Q Okay. So there's no ability with  
2 those to select a particular song and hear it  
3 right on the spot?

4 A I don't know. I actually haven't  
5 been there.

6 Q So let's talk about the stream  
7 ripping that you discuss on page 8 of your  
8 statement. Now, as you explain it there,  
9 you've had people tell you that they rip the  
10 songs, as you call it, that you provide on  
11 demand on your site, is that correct?

12 A That's true.

13 Q Okay. So, essentially, these  
14 users that have told you this know that one of  
15 your songs is going to play because they can  
16 actually select it from the link on your site,  
17 is that right?

18 A Right.

19 Q Okay. That's different, is it  
20 not, than attempting to stream rip a song from  
21 a webcasting station where you don't know what  
22 song is going to play when you select the

1 station?

2 A I suppose it's different.

3 Q Now later in the third paragraph  
4 on page 8, if you could take a look, you say,  
5 "The fact that a music fan can listen to a  
6 streamed webcast and rip it as well highlights  
7 the importance of the digital performance  
8 royalty for me and artists like me." Do you  
9 see that?

10 A I'm sorry, where are you again?

11 Q I'm in the second full  
12 paragraph --

13 A Okay.

14 Q -- that starts with the net  
15 result.

16 A Uh-hum.

17 Q And I'm looking at the last  
18 sentence.

19 A Okay.

20 Q Okay, do you see that?

21 A Yes.

22 Q So I'll read it just one more

1 time, so we've got it. "The fact that a music  
2 fan can listen to a streamed webcast and rip  
3 it as well highlights the importance of the  
4 digital performance royalty for me and artists  
5 like me."

6 So, basically, Ms. Brooke, my  
7 question is that you've talked about what  
8 happens on your site and drawn a conclusion  
9 about that, and then you, essentially, lump in  
10 all streamed webcasts with that conclusion  
11 that you've drawn, is that right?

12 A I think that fans can figure out  
13 how to rip anything from anywhere. So since  
14 we took tons of safeguards when we put up the  
15 streams on my website to, hopefully, keep this  
16 from happening, and yet it happened, and my  
17 fans would boast to me about it, I kind of  
18 have to assume that there are plenty of  
19 hackers out there that are going to be ripping  
20 streamed webcasts as well.

21 Q Okay.

22 A I made an assumption.

1 Q Right. But, again, as you have  
2 said before, when they rip something from your  
3 website, that happens when they are able to  
4 choose the song, essentially, on the spot and  
5 record it, and that's not what happens with  
6 the ripping of an internet radio stream on a  
7 webcasting service.

8 A Right. They may know what they're  
9 going to rip at the moment of ripping.

10 Q Right. Okay. Let me ask you  
11 this: You describe here --

12 A Can I make one distinction also  
13 between my website and perhaps a webcast? I  
14 chose to make my songs available for  
15 streaming, hoping that it would lead people to  
16 buy. I put a lot of things on my site  
17 encouraging people, hey, if you like this,  
18 please go buy my record; it really makes a  
19 difference to me.

20 If someone's ripping a webcast and  
21 my songs happen to be in the broadcast, I  
22 didn't necessarily choose to have them ripped

1 for free. I didn't know they were perhaps on  
2 the webcast. I think there's a difference in  
3 choosing to make something available and not  
4 having any control over it.

5 Q Okay. We'll talk about the  
6 ripping of the other webcasts in a little bit.

7 Now, as you say, you chose to put  
8 these on your site. In fact, despite the  
9 stream-ripping activity that we have been  
10 talking about, you actually continue to offer  
11 those songs on your website?

12 A I actually have been meaning to  
13 take them down for a long time now, and it's  
14 embarrassing because I have not been able to  
15 pay my webmaster for a few months, and so have  
16 not done it yet. But I think it was a big  
17 disaster to have done the streaming in the  
18 first place and I regret it.

19 Q Okay. Can you take a look back at  
20 Exhibit -- your web page, the music page, I  
21 think it was Exhibit 81 (sic), is that right?  
22 I marked every copy but my own.

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1           You see on the front page, if you  
2           can look down to the paragraph that starts,  
3           "One of the reasons" --

4           A       Uh-hum.

5           Q       It says, "One of the reasons that  
6           I decided to have all the albums available for  
7           streaming in the music section is so that you  
8           can send your friends here, urge them to check  
9           out the music." And then a little bit later  
10          in that paragraph you say, "Here's a chance to  
11          try them out before you buy."

12          A       Uh-hum.

13          Q       And then towards the end you say,  
14          "If you like it, buying it and turning someone  
15          else onto it is the best way to help me do  
16          what I do." So that's still up on your  
17          website, correct?

18          A       Yes.

19          Q       And does that not reflect your  
20          belief, at least when you wrote that, that  
21          providing the music, providing these streams  
22          on your website would, in fact, expose people

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1 to the music and potentially lead to them --

2 A Lead to sales, yes.

3 Q Okay.

4 A I was hoping.

5 Q Okay, right. Let's move on.

6 A But I have to say, if I can add, I  
7 have witnessed a real drop in sales, actually,  
8 on my website. It's pretty much 50 percent of  
9 what it was on the last record since I started  
10 streaming.

11 Q Do you have any evidence  
12 suggesting that the drop has anything to do  
13 with the fact that these streams are on your  
14 website?

15 A I can only imagine that it does.

16 Q Now you're familiar with the fact  
17 that the statute that's governing this  
18 proceeding instructs that the Board should  
19 consider promotional value of webcasting in  
20 making its determination, correct?

21 A Yes.

22 Q I just want you to take a look

1 again at this page we were just looking at.

2 A The music page?

3 Q Yes, the music page.

4 A Okay.

5 Q It says, "Call your radio stations  
6 and ask them to play the latest single." I  
7 assume, Ms. Brooke, if I'm correct, that you  
8 make that request because you feel that radio  
9 play promotes sales of albums, correct?

10 A I have to say that I wish that it  
11 did promote sales of albums more than I've  
12 actually experienced myself.

13 Q Now you mentioned in Philadelphia  
14 and the fact that Philly is a good town for  
15 you to perform.

16 A Philly is a good city for me.

17 Q Okay. Now I remember first  
18 hearing of the story on WXPB in Philadelphia,  
19 and "Angel in the House" was actually what  
20 they called the featured album of the week.  
21 Do you remember that?

22 A Yes.

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1 Q For the benefit of the panel, can  
2 you tell them what WXPB is?

3 A WXPB is, I believe it's an NPR  
4 station in Philadelphia. It's based at the  
5 University there, and it's a great radio  
6 station.

7 Q Okay. And being featured album  
8 means essentially that they put the album into  
9 the --

10 JUDGE WISNIEWSKI: Excuse me. Is  
11 that the University of Pennsylvania?

12 THE WITNESS: Yes, UPENN, yes.

13 BY MR. LARSON:

14 Q Being featured album, then, meant  
15 that WXPB basically put your album into heavy  
16 rotation for the week and provided some  
17 promotional plugs for the album, is that  
18 right?

19 A Well, I think that it's a two-way  
20 street. I think that they also know that I  
21 have a certain cache in their market and will  
22 draw listeners to their radio station. So

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1 it's promotional probably for both WXPB and  
2 for myself.

3 Q Right, but at the time that "Angel  
4 in the House" was their featured album, you  
5 were a relatively new artist, correct?

6 A Relatively new, yes.

7 Q Okay. In fact, that album ended  
8 up being voted by WXPB listeners as the top  
9 album of 1993 among those listeners, is that  
10 right?

11 A Well, I had forgotten that.

12 Q Right. So let me ask you this:  
13 Is it your opinion that being the featured  
14 album of the week and being voted the top  
15 album of 1993 helped your sales?

16 A I suppose it helped my sales.

17 Q Are you aware that webcasters like  
18 AOL and Yahoo offer essentially similar  
19 programs, "Who's Next?" on Yahoo, AOL  
20 "Breakers," programs like that?

21 A I've never been offered anything  
22 like that.

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1 Q Okay. So you just don't know  
2 whether they do or not?

3 A Well, my impression is that web  
4 radio as well as terrestrial radio is more  
5 about selling advertising than really about  
6 selling music.

7 Q Okay.

8 A So I'm providing content perhaps,  
9 but it's more about building a business, and  
10 that's what I'm trying to do by being paid for  
11 what I do.

12 MR. LARSON: Now let me just see.  
13 I want to pass out another exhibit, if I  
14 could.

15 Actually, before I do that, Your  
16 Honor, I would like to move Exhibit -- I'm  
17 sorry, the music page. Is it 81? Eighty?  
18 Exhibit 80 into evidence.

19 CHIEF JUDGE SLEDGE: Any objection  
20 to the offer of Exhibit 80?

21 MR. FREEDMAN: No, Your Honor.

22 CHIEF JUDGE SLEDGE: Without

1 objection, the exhibit is admitted.

2 [Whereupon, the document  
3 marked as Services  
4 Exhibit 80 for  
5 identification was  
6 received in evidence.]

7 MR. LARSON: I'm going to pass out  
8 what I've labeled as Services Exhibit 81.

9 [Whereupon, the document  
10 was marked as Services  
11 Exhibit 81 for  
12 identification.]

13 BY MR. LARSON:

14 Q Ms. Brooke, do you recognize this?

15 A Yes, I do.

16 Q Can you tell us what it is?

17 A This is my March 2006 journal  
18 entry that I put up on my website.

19 Q That's something you regularly do  
20 on your website?

21 A I try to do it pretty regularly.

22 Q Okay. Down in, I think it's the

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1 third paragraph, you mention that the WB show  
2 "Related" has licensed a song called "No Net  
3 Below" for two episodes this February and  
4 March?

5 A Yes.

6 Q Okay. That's a song that you  
7 recorded on your album "Back in the Circus,"  
8 correct?

9 A Yes.

10 Q And that album is from 2003, 2004?

11 A That's from 2004, I believe.

12 Q Okay. When you wrote and recorded  
13 "No Net Below" two or three years ago, you  
14 included that song on the album without  
15 knowing that in 2006 it was going to be  
16 licensed for use in this WB television  
17 program, is that right?

18 A That's right.

19 Q Okay. Now you've also mentioned  
20 -- just one second, please.

21 A They actually only ended up using  
22 it for one episode.

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1 Q Sorry.

2 A We just found out last week.

3 Q You also mentioned in your  
4 statement, I think, that you have licensed  
5 songs of yours for use in the show "Dawson's  
6 Creek"?

7 A Yes.

8 Q Okay, and the show that you  
9 licensed that for in "Dawson's Creek," that  
10 was a song called "Walking"?

11 A I believe it was.

12 Q Okay. That's from your "Steady  
13 Pull" album?

14 A Yes.

15 Q You licensed a song called "Your  
16 House" for the show "Once and Again"?

17 A Yes.

18 Q That's also on the "Steady Pull"  
19 album?

20 A Yes.

21 Q Okay.

22 MR. LARSON: At this point, Your

1 Honor, I want to ask Ms. Brooke about the  
2 actual financial payments that were made for  
3 use of those songs, which is I think is  
4 restricted material. So I would move to apply  
5 the protective order for a few minutes while  
6 we discuss that financial material.

7 CHIEF JUDGE SLEDGE: Where are  
8 those other songs, on this exhibit?

9 MR. LARSON: No, they're actually  
10 on an exhibit that I haven't handed out and  
11 wasn't planning to unless Ms. Brooke needed me  
12 to refresh her recollection, but I was  
13 planning to discuss it orally.

14 CHIEF JUDGE SLEDGE: Which songs?

15 MR. LARSON: The first song is  
16 called "Walking," and the second song is  
17 called "Your House."

18 CHIEF JUDGE SLEDGE: Any objection  
19 to the motion to apply the protective order to  
20 questions on the revenue derived from the  
21 songs "Walking" and "Your House"?

22 (No response.)

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1 Without objection, the motion is  
2 granted.

3 (Whereupon, the proceedings went  
4 into Closed Session.)  
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22

1 BY MR. LARSON:

2 Q As I understand it, Ms. Brooke,  
3 the money, the financial investment that you  
4 make recording the CD is essentially an  
5 investment that you hope to recoup by some CD,  
6 is that right?

7 A I hope to recoup it in many ways.

8 Q Right, right. Like downloads and  
9 iTunes have become a part of --

10 A iTunes has been a really great  
11 source.

12 Q Right, right. The gamble, as you  
13 described it in your testimony earlier, is  
14 that you won't end up selling enough CDs to  
15 make up for your investment?

16 A It's always a gamble.

17 Q Right, right. As you say, you  
18 lose your shirt and hope it comes back?

19 A I've lost so many shirts.

20 Q Okay.

21 A I'm banking on pants now.

22 (Laughter.)

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1 Q Can you look back, again, back to  
2 Exhibit 80, your music page? And, actually,  
3 to page 3 of that exhibit? There's a  
4 paragraph at the end that starts with  
5 "Anyway." Do you see that? I'm just going to  
6 read that, so it's clear.

7 You say, "Making records has  
8 certainly changed since I started." Do you  
9 see that in the second sentence?

10 A Yes.

11 Q All right. I'm sorry, I actually  
12 would like to start before that. You say,  
13 "Anyway, it was bizarre flying across country  
14 with all of this work in one Firewire Drive.  
15 Making records has certainly changed since I  
16 started."

17 Can you tell the panel what a  
18 Firewire Drive is?

19 A It's a drive that you can store  
20 information on. So if you are working in the  
21 digital realm, in the recording studio, if you  
22 have files that you have put into a -- like we

1 work in Pro Tools a lot in the recording  
2 studio. So once you've recorded something,  
3 you can actually condense it into a Firewire  
4 Drive, into a hard drive that you can travel  
5 with and then open up again in the next  
6 recording studio that you go to, where you  
7 maybe want to add, you know, a horn trio or a  
8 bass player that couldn't come to Los Angeles.  
9 So you're back in New York and you want to  
10 work on the record some more. A hard drive  
11 can actually contain all that information  
12 that's on your record.

13 Q Okay. And you say a little bit  
14 below in that paragraph, "The really good part  
15 of the technology is being able to try crazy  
16 ideas quickly by shifting parts and sections  
17 around, and you just undo it if it doesn't  
18 work." Right?

19 A Yes.

20 Q Okay. Just before I ask a  
21 question, I want to show you one other thing,  
22 if I could.

1 MR. LARSON: Okay, I'll mark this  
2 as Services Exhibit 82 or 3, right? Eighty-  
3 two.

4 [Whereupon, the document  
5 was marked as Services  
6 Exhibit 82 for  
7 identification.]

8 THE WITNESS: You've been on my  
9 website quite a bit.

10 BY MR. LARSON:

11 Q Yes, I have. Don't get the wrong  
12 idea.

13 (Laughter.)

14 Now down in the fourth paragraph  
15 that starts with, "And speaking of new songs"  
16 --

17 A Yes.

18 Q Towards the middle of that, again,  
19 similar to the other page we just looked at,  
20 you say, "Making records is such a different  
21 beast now. No more months of planning an away  
22 time at the studio. No big budget. It's all

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1 about catching stuff on the fly on the laptop  
2 at whomever's house, wherever. I travel with  
3 my Firewire Drive full of completely tracked  
4 songs, and it's so strange."

5 Now when you talk about traveling  
6 around with your Firewire Drive and no more  
7 months of planning and time at the studio,  
8 what you're saying -- correct me if I'm wrong  
9 -- is, basically, that advances in technology  
10 have worked to cut the cost of recording for  
11 you in some respects, is that true?

12 A That depends on what kind of  
13 record you're making.

14 Q Okay.

15 A In 2003 I was, as usual, penniless  
16 and I had to make a record very much on the  
17 fly that way, very much in Pro Tools, very  
18 contained. In fact, I ended up playing a lot  
19 of the instruments on the record because I  
20 just couldn't afford to bring in more people.

21 This time I chose to make a record  
22 a different way. I brought in my band to the

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1 studio and we tracked all at once, and it was  
2 a much more expensive record to make.

3 You kind of choose which way  
4 you're going to go at any given time. There's  
5 still crazy amounts of costs. Even if you're  
6 doing it in Pro Tools in your laptop in a  
7 hotel room, there are still costs.

8 Q Right.

9 A And I bear those costs as the  
10 record label.

11 Q But in some respects, as you say,  
12 what used to take weeks and weeks in the  
13 studio may in some respects be done now  
14 outside the studios?

15 A Yes, it still may take weeks and  
16 weeks. I don't have the luxury of Elektra  
17 Records giving me a quarter of a million  
18 dollars.

19 Q Once a recording is done, it's the  
20 case, is it not, that the internet has made it  
21 possible for you to take music that you've  
22 recorded and essentially distribute it without

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1 additional costs to you, is that right?

2 A Yes.

3 Q Okay. That's to be contrasted  
4 with physical CDs where, as you mentioned  
5 before, there are costs like packaging and  
6 manufacturing and photo sleeves and things  
7 like that?

8 A Yes. Even for iTunes, though, you  
9 have to provide a photograph, you know, a  
10 quality JPEG that would accompany each song.  
11 They won't even take your music unless you  
12 have an appropriate image that will accompany  
13 whichever song you're offering for  
14 downloading.

15 Q You mentioned touring expenses in  
16 your statement and in your testimony. Let me  
17 just ask this: You spend that money and, as  
18 you said, sometimes lose money touring, in an  
19 effort to generate sales of your CDs, is that  
20 right?

21 A Yes, and also in an effort to keep  
22 a presence in the marketplace.

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1 Q Right, right.

2 A To keep the audience that I've  
3 managed to build over the years.

4 Q In fact, as you say in places on  
5 your blog or on your journal on your website,  
6 touring in itself is in some ways your reward,  
7 right?

8 A It's one of my rewards, yes. I  
9 love to tour.

10 Q So even above and beyond the  
11 financial considerations, it's rewarding to  
12 you?

13 A Yes.

14 Q Now let's just move quickly on to  
15 another topic. You talk in your statement  
16 about your concern or your belief that fans  
17 will get more of their music -- this is on  
18 page 7, if you want to take a look -- fans  
19 will get more of their music by listening to  
20 various kinds of streaming services rather  
21 than by purchasing music in the form of CDs.

22 A Seven, oh, on listening. Sorry.

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1 Q Yes, I'm sorry. We've got lots of  
2 exhibits.

3 A And I'm sorry, where are you?

4 Q Well, I just had it written in my  
5 notes. The bottom paragraph, the sentence  
6 that starts, "As more people use webcasting  
7 service."

8 A Okay.

9 Q Let me just ask you this: Did you  
10 consult any evidence or any studies or  
11 anything of that matter when you made this  
12 statement?

13 A No, I did not consult any studies.  
14 I was speaking from personal experience.

15 Q From what people have told you  
16 about ripping your --

17 A Yes, from just knowing my own  
18 band.

19 Q Right. When you wrote this  
20 statement, when you used the term "streaming  
21 services" in that sentence, did you mean to --  
22 were you discussing all types of streaming

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1 services or specifically statutorily-compliant  
2 webcasts like those that we're dealing with in  
3 this proceeding?

4 A I don't think I was being  
5 specific.

6 Q Okay. Are you aware, Ms. Brooke,  
7 that a lot of the major webcasters offer  
8 stations that are actually fairly general in  
9 nature, top 40 stations, country hits, those  
10 types of stations?

11 A Yes.

12 Q That's in addition to some of the  
13 more narrow or niche stations that they offer?

14 A Yes.

15 Q Are you aware of the listing  
16 habits or data in terms of who's listening to  
17 the more general stations versus the more  
18 narrow stations?

19 A I don't really have access to that  
20 kind of data.

21 Q Okay. You mentioned before that  
22 your music -- well, let me rephrase that. You

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1 described your music as pop, right, before?

2 A Yes.

3 Q And you mentioned that the  
4 stations, so-called AAA stations, sort of  
5 embraced when you came out in the early  
6 nineties?

7 A Yes.

8 Q What are AAA stations?

9 A AAA stands for Adult Alternative  
10 -- I don't really remember what the third "A"  
11 is.

12 Q Okay.

13 A Adult --

14 Q That's okay.

15 A Shame on me for not knowing my own  
16 format.

17 Q Adult alternative, though, is a  
18 genre that is --

19 A Oh, certainly.

20 Q There are webcasts that feature  
21 adult alternative music, right?

22 A I believe there are, yes.

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1 Q Okay. Some of those, in fact,  
2 play your music, is that right?

3 A I hope they play my music.

4 Q Right. So when you make the  
5 statement that fans will listen to streaming  
6 services rather than purchasing music, are you  
7 suggesting that a listener to, say, the adult  
8 alternative station on a webcasting service  
9 would be just as happy listening to that  
10 service as buying your CD?

11 A They might.

12 Q So is that to say that your music  
13 is interchangeable with the other music that's  
14 on that station?

15 A I don't think I said that.

16 Q But isn't that the essence of  
17 substitution, if they would, instead of buying  
18 your CD, listen to the station? They're just  
19 as happy with one or the other?

20 A I don't think it's the same thing.

21 MR. LARSON: Okay. One more topic  
22 and then I'll be done with Ms. Brooke. I'll

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1 finish before lunch.

2 BY MR. LARSON:

3 Q Could you turn to page 8 of your  
4 statement? You say at the bottom that the  
5 availability of free music on the internet  
6 cuts into your and other artists' ability to  
7 sell music. Do you see that?

8 A Yes.

9 Q All right. Then you go on in the  
10 next sentence to describe that recordings on  
11 peer-to-peer sites have fostered certain ideas  
12 in the marketplace about music being free,  
13 right?

14 A Right.

15 Q And when you say, "peer-to-peer  
16 sites," you're talking about services like  
17 Kazaa, Morpheus, and --

18 A Yes.

19 Q Right? Those are services where  
20 people can search song by title or by artist  
21 and then download it on the spot, right?

22 A Yes.



1 Q So, again, those are not the kind  
2 of services that we're dealing with in this  
3 proceeding, is that right?

4 A No, but I know that most of my  
5 friends are listening to web streams pretty  
6 much every day when they work --

7 Q Right.

8 A -- or wherever they are, and I  
9 have to say they're not buying many records  
10 these days.

11 Q But that's not, when you're  
12 talking about peer-to-peer piracy here or  
13 peer-to-peer sharing of files, you're talking  
14 about something different than webcasting?

15 A Yes.

16 MR. LARSON: Just give me one  
17 second, Your Honor?

18 (Pause.)

19 THE WITNESS: I think in my  
20 statement I was -- am I allowed to speak? No?

21 (Pause.)

22 BY MR. LARSON:

1 Q Ms. Brooke, we were talking a bit  
2 before about the costs involved with  
3 recording, or you testified to them, recording  
4 costs, distribution cost, packaging,  
5 manufacturing. It's true, is it not, that  
6 those costs are costs that are often incurred  
7 by the record company?

8 A Well, I'm the artist and the  
9 record company.

10 Q Right. But in situations where  
11 there's a record -- where you're essentially  
12 signed to another record company that's not  
13 your own, those would be costs that would be  
14 paid for by the record company?

15 A Well, I believe even if you're on  
16 another record company, a lot of those costs  
17 are recoupable to the artist, so they would  
18 come out of the artist royalty.

19 Q What about touring expenses?  
20 That's not the case with --

21 A Touring expenses, sometimes --  
22 well, that sometimes a 50/50 label/artist

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1 cost, but in my case it's 100/100.

2 MR. LARSON: I have no more  
3 questions, Your Honor.

4 CHIEF JUDGE SLEDGE: Thank you,  
5 sir.

6 That completing your cross  
7 examination and it being near our scheduled  
8 break time, we'll recess and return at 2:00  
9 p.m.

10 (Whereupon, the foregoing matter  
11 went off the record at 12:25 p.m. for lunch  
12 and went back on the record at 2:03 p.m.)

13 CHIEF JUDGE SLEDGE: Thank you.  
14 We'll come to order.

15 MR. LARSON: Your Honor, Todd  
16 Larson for DiMA.

17 Just before we move on to the next  
18 cross examination, if I could, I would like to  
19 move Exhibits 81 and 82 into evidence.

20 CHIEF JUDGE SLEDGE: You have  
21 completed your cross? Do you want to do more?

22 MR. LARSON: I would ask -- these

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1 were exhibits that we already dealt with. I  
2 just wanted to move them into evidence, yes.

3 CHIEF JUDGE SLEDGE: Which one?

4 MR. LARSON: Exhibit 81, which is  
5 a March 2006 journal entry from Ms. Brooke's  
6 website.

7 CHIEF JUDGE SLEDGE: Any objection  
8 to Exhibit 81?

9 MR. FREEDMAN: No, Your Honor.

10 MR. LARSON: And Exhibit 82, which  
11 is an August 2003 journal entry.

12 CHIEF JUDGE SLEDGE: Without  
13 objection, Exhibit 81 is admitted.

14 [Whereupon, the document  
15 marked as Services  
16 Exhibit 81 for  
17 identification was  
18 received in evidence.]

19 MR. LARSON: And Exhibit 82 was an  
20 August 2003 journal entry from the website.

21 CHIEF JUDGE SLEDGE: Is there any  
22 objection to admission of Exhibit 82?

1 MR. FREEDMAN: No, Your Honor.

2 CHIEF JUDGE SLEDGE: Without  
3 objection, Exhibit 82 is admitted.

4 MR. LARSON: Thank you, Your  
5 Honor.

6 [Whereupon, the document  
7 marked as Services  
8 Exhibit 82 for  
9 identification was  
10 received in evidence.]

11 CHIEF JUDGE SLEDGE: All right,  
12 next from the broadcasters.

13 MR. WOOD: Thank you, Your Honor.

14 CROSS EXAMINATION

15 BY MR. WOOD:

16 Q Good afternoon, Ms. Brooke. My  
17 name is Seth Wood. I represent a number of  
18 radio broadcasters.

19 A Hi, Seth.

20 Q Your manager is named Patrick  
21 Raines, is that right?

22 A Uh-hum.

1 Q Okay. Are you married to him  
2 currently?

3 A I am.

4 Q Oh, all right.

5 A Currently.

6 Q You sound happy.

7 (Laughter.)

8 That's good.

9 Is he on the board currently at  
10 SoundExchange?

11 A At SoundExchange, yes, he is.

12 Q Okay, that's all I have.

13 MR. WOOD: Thank you, Your Honor.

14 Thank you.

15 JUDGE ROBERTS: Before you start,  
16 Ms. Brown, what did you say the name of your  
17 husband was again?

18 THE WITNESS: Patrick Raines.

19 JUDGE ROBERTS: Thank you.

20 CHIEF JUDGE SLEDGE: Ms. Brown?

21 CROSS EXAMINATION

22 BY MS. BROWN:

1 Q Good afternoon, Ms. Brooke.

2 A Hi.

3 Q I just have a few questions for  
4 you. My name is Kris Brown, and I'm  
5 representing NPR.

6 A Hi, Kris.

7 Q Are you familiar with NPR?

8 A Yes, I love NPR.

9 Q Wonderful. That's good to hear.

10 I think you testified earlier that  
11 you hope to promote sales of your sound  
12 recordings by exposing your music to as many  
13 new listeners as possible, is that correct?

14 A Uh-hum. Yes, yes.

15 Q Over the years you've given many  
16 interviews to NPR, haven't you?

17 A Yes, I have.

18 Q And you've performed some of your  
19 songs live in NPR Studio 4A, haven't you?

20 A Yes, I have.

21 Q Can you describe to the panel  
22 Studio 4A?

1 A Is that one in Washington?

2 Q Yes.

3 A I think that that's the new one,  
4 right?

5 Q Right.

6 A There's a beautiful, new, state-  
7 of-the-art studio, if I recall right, where  
8 they record "All Things Considered."

9 Q Right.

10 A And I was lucky enough to do a  
11 performance there. I brought my band from LA  
12 and drove down to D.C. to do an "All Things  
13 Considered" show with Michele Norris. I think  
14 it was a couple of years ago.

15 Q Uh-hum.

16 A It's a beautiful, state-of-the-art  
17 facility. They record on multi-track and it  
18 sounds great, and it was a great opportunity.

19 Q Have you visited NPR's website?

20 A I don't think that I have, no.

21 MS. BROWN: What number are we for  
22 Services exhibits? I would like to mark

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1 Services Exhibit 83, which is a screenshot  
2 from NPR's website.

3 [Whereupon, the document  
4 was marked as Services  
5 Exhibit 83 for  
6 identification.]

7 BY MS. BROWN:

8 Q It says at the top here, "Jonatha  
9 Brooke Live in Studio 4A"?

10 A Uh-hum. Yes.

11 Q As you read down on the lefthand  
12 column, it says, "Jonatha Brooke and her band.  
13 Hear full-length cuts performed live in NPR's  
14 Studio 4A"?

15 A Uh-hum. Yes.

16 Q And then there are links to  
17 several songs there, "War," "Steady Pull,"  
18 "Your House," "So Much Mine," "A New Dress."  
19 Are those songs you recall performing in  
20 Studio 4A?

21 A Yes, I think I did.

22 Q Then the main body of the text

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1 here is an article from our "All Things  
2 Considered" about you and about your music and  
3 the song "War," in particular.

4 A Right.

5 Q Isn't that right? Okay.

6 A Yes.

7 Q In fact, Ms. Brooke, you wouldn't  
8 give interviews to NPR or perform in Studio 4A  
9 if you didn't believe there was a benefit  
10 associated with that, would you?

11 A I would not do it, no, if there  
12 was no benefit.

13 Q And is it possible that  
14 individuals may be listening to news and  
15 educational content through NPR's website,  
16 hear an interview with you on a program like  
17 "Morning Edition" or "All Things Considered,"  
18 and learn about you for the first time because  
19 of hearing about you on NPR?

20 A It's possible that they would.

21 Q And that such exposure, therefore,  
22 increases your potential fan base and music

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1 sales related thereto?

2 A It has the potential to do that.  
3 It also has the potential to bring more  
4 listeners to NPR that perhaps might not have  
5 listened otherwise, because I think I give to  
6 them a certain value of being on their  
7 programming.

8 Q I think that you said in your  
9 written statement, if you turn to page 7 of  
10 your written statement, in the last full  
11 paragraph, the second sentence says, "The  
12 digital streaming services like the ones in  
13 this proceeding offer people a different way  
14 to listen to music, hundreds of channels  
15 playing thousands of artists performing every  
16 genre and type of recording." Is it your  
17 understanding that NPR offers that kind of  
18 service to its listeners?

19 A Yes.

20 Q Offers hundreds of channels?

21 A I don't -- actually, I'm not aware  
22 of how many channels NPR offers.

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1 Q Would it surprise you to learn  
2 that the programming that's offered on NPR in  
3 terms of web streaming mirrors the NPR  
4 broadcasts that you hear on the radio?

5 A No, that would be what I expected.

6 MS. BROWN: Your Honor, I'd like  
7 to move Services Exhibit 83 into evidence,  
8 please.

9 CHIEF JUDGE SLEDGE: On what  
10 basis?

11 MS. BROWN: That it's an NPR  
12 screenshot that Ms. Brooke recognized --

13 CHIEF JUDGE SLEDGE: No, Ma'am.  
14 She said she wasn't familiar with it.

15 Any other questions?

16 MS. BROWN: No other questions,  
17 Your Honor.

18 CHIEF JUDGE SLEDGE: Without  
19 foundation, Exhibit 83 is not admitted.

20 Any other cross examination?

21 MR. FREUNDLICH: No cross, Your  
22 Honor.

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1 CHIEF JUDGE SLEDGE: Thank you.  
2 That completes the cross examination.

3 Are there any other redirect  
4 questions to this witness?

5 MR. FREEDMAN: May I have your  
6 indulgence for 30 seconds, please?

7 CHIEF JUDGE SLEDGE: Yes, sir.

8 (Pause.)

9 MR. FREEDMAN: Just one question,  
10 Your Honor.

11 CHIEF JUDGE SLEDGE: All right.

12 REDIRECT EXAMINATION

13 BY MR. FREEDMAN:

14 Q Ms. Brooke, after appearing on  
15 those various shows on NPR, have you  
16 experienced an uptake in your sales?

17 A I can't say that I have, no.

18 Q Thank you.

19 MR. FREEDMAN: Nothing further.

20 CHIEF JUDGE SLEDGE: Thank you,  
21 Ms. Brooke.

22 THE WITNESS: Thank you.

1 (Witness excused.)

2 MR. SMITH: We are just getting  
3 Mr. Simson at this point.

4 CHIEF JUDGE SLEDGE: Mr.  
5 Steinthal, we completed the day of Mr. Simson  
6 on the stand just about as you were almost  
7 through with your examination. So if you  
8 would complete that little bit of examination  
9 you have left?

10 MR. STEINTHAL: And, Your Honor,  
11 it is a little bit -- famous last words, I  
12 know.

13 WHEREUPON,

14 JOHN SIMSON  
15 resumed the witness stand, and, having been  
16 previously duly sworn, was examined and  
17 testified as follows:

18 CONTINUED CROSS EXAMINATION

19 BY MR. STEINTHAL:

20 Q Good afternoon, Mr. Simson.

21 A Good afternoon.

22 CHIEF JUDGE SLEDGE: Mr. Simson, I

1 remind you that you have been sworn and you  
2 remain under oath.

3 THE WITNESS: Yes, sir.

4 BY MR. STEINTHAL:

5 Q I hope you had a good trip to  
6 Europe.

7 A I did.

8 Q There's only one subject I want to  
9 raise with you this afternoon that I didn't  
10 get to the last time.

11 In your direct testimony, sir, you  
12 testified that the Librarian in the first CARP  
13 rejected the viability of using a musical  
14 works benchmark for piece-setting purposes.  
15 Do you recall testifying to that?

16 A Yes, I do.

17 Q Now, in fact, you're familiar, as  
18 you walk through the history of the  
19 proceedings, that the musical works benchmark  
20 was initially offered as a benchmark in the  
21 1998 pre-existing services CARP proceeding,  
22 was it not, involving digital cable radio?

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1 A That's correct.

2 Q It's correct, is it not, that in  
3 the 1998 decision, in that proceeding the  
4 Librarian actually utilized the licensee's  
5 musical works fee as a relevant benchmark for  
6 setting that licensee's digital sound  
7 recording fees, correct?

8 A As I think I mentioned earlier, I  
9 wasn't at SoundExchange -- that happened pre-  
10 my-time. So I know there was some discussion  
11 about the musical work, but I don't know that  
12 it was actually a benchmark in that.

13 [Whereupon, the document  
14 was marked as Services  
15 Exhibit 84 for  
16 identification.]

17 Q Let me ask you to take a look at  
18 what we've marked as Services Exhibit 84,  
19 which is a copy of the Librarian's decision in  
20 the pre-existing services case in 1998.

21 Now take a look, if you would, at  
22 page 25404 from The Federal Register. See,

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1 starting in the middle column of that page, at  
2 the bottom, it says, "In this proceeding the  
3 Registrar finds that both the negotiated DCR  
4 license fee and the marketplace licensee fee  
5 for the performance of the musical works are  
6 useful at least in circumscribing the possible  
7 range of values under consideration for the  
8 statutory performance license in sound  
9 recordings."?

10 A I do see that.

11 Q And then it goes on, "While the  
12 DCR license fee purports to represent a  
13 negotiated value for a right to which by law  
14 the record companies were not entitled, in  
15 addition to the recognition that the right  
16 should exist, the Registrar acknowledges that  
17 the value of the DCR license provides minimal  
18 information as to the value of the performance  
19 right ultimately granted in the DPRSA,  
20 although it does provide some guidance for  
21 assessing the proposed rate."

22 Then if you skip down a little bit

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1 to the next paragraph, it says, "On the other  
2 hand, the second reference point, the  
3 negotiated license fees for the performance of  
4 music embodied in sound recordings, offers  
5 specific information on what the services  
6 actually pay for the already-established  
7 performance rate of one component of the sound  
8 recording."

9 Then if you skip, if you would, to  
10 the conclusions on page 25409 --

11 A Twenty-four --

12 Q 25409.

13 A Okay.

14 Q At the third column to the right,  
15 starting with "In formulating," way down in  
16 the third column, where it says, "In  
17 formulating her recommendation as to the  
18 appropriate rate for the digital performance  
19 license, the Registrar, like the panel,  
20 considered the relevant marketplace points of  
21 reference offered into evidence. These  
22 reference points guided the Registrar in her

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1 task of setting a reasonable rate for the  
2 performance of digital sound recordings, but,  
3 unlike the panel, the Registrar gave more  
4 consideration to the rates paid for the  
5 performance rate in the musical compositions  
6 because these rates represent an actual  
7 marketplace value for a public performance  
8 rate in the digital arena, albeit not the  
9 digital performance rate in sound recordings."

10 That refers to footnote 33, which  
11 states, "The values of the relevant  
12 marketplace reference points, the DCRA  
13 negotiated license fee, and the license for  
14 the performance of the musical works are  
15 subject to a protective order and, hence,  
16 their numerical values have been omitted.  
17 Nevertheless, the values of the performance  
18 rights embodied in these licenses figure  
19 prominently in the determination of the value  
20 for the digital performance right in sound  
21 recordings. In fact, the sum of these license  
22 fees establishes the outer boundary of the

1 zone of reasonableness for this proceeding."

2 Do those passages in the  
3 Librarian's decision in the pre-existing  
4 services case refresh your recollection that,  
5 in fact, the Librarian did rely on the musical  
6 works fees of the licensees in that case as a  
7 benchmark for rate-setting?

8 A That it was a relevant item to  
9 look at? Yes.

10 Q Now you also testified that the  
11 value of the sound recording performance is  
12 greater than the value of a musical works  
13 performance, did you not?

14 A Yes.

15 Q Let's take a look at page 25404 in  
16 the Librarian's decision in the pre-existing  
17 services case.

18 CHIEF JUDGE SLEDGE: Mr.  
19 Steinthal, I'm puzzled. Are you asking him,  
20 are you reviewing this just so you can read  
21 from the exhibit or are you asking him if  
22 reading this makes him remember something that

1 occurred before he was involved in the  
2 business?

3 MR. STEINTHAL: Your Honor, he  
4 testified unequivocally that the Librarian  
5 rejected the musical works benchmark in the  
6 prior CARP. There is jurisprudence in the  
7 prior CARPs from 1998 to the last CARP on this  
8 precise issue. I'm trying to refresh his  
9 recollection, upon looking at these decisions,  
10 as to whether, in fact, he has a basis for the  
11 conclusion he testified to on direct.

12 CHIEF JUDGE SLEDGE: The last CARP  
13 was the time that he was involved in  
14 SoundExchange. This decision is before he was  
15 involved in SoundExchange.

16 MR. STEINTHAL: Your Honor, I  
17 understand that. However, he testified on  
18 direct about his experience in the business  
19 spanning many decades, and I think that he  
20 testified generally about the subject matter  
21 of what is referenced in these decisions. It  
22 may or may not help him form a basis for

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1       answering my question as to whether there is  
2       a basis for his assertions with respect to the  
3       musical work benchmark.

4                   CHIEF JUDGE SLEDGE:       For a  
5       decision made while he was at SoundExchange?

6                   MR. STEINTHAL: Your Honor, if his  
7       decisions may have been informed by many  
8       things -- I mean he testified about his  
9       experience not just at SoundExchange, but in  
10      the music industry for decades. That was the  
11      basis for much of his testimony, not just his  
12      experience at SoundExchange. I would imagine  
13      that he made himself aware of decisions  
14      affecting SoundExchange during the course of  
15      his stint as a representative of  
16      SoundExchange.

17                  CHIEF JUDGE SLEDGE: If it makes  
18      him remember something that he has now  
19      forgotten, I guess you can go into that.

20                  BY MR. STEINTHAL:

21                  Q       Now did you consider in your  
22      testimony about the greater value of a sound

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1 recording performance than a musical works  
2 performance the fact that prior CARP  
3 proceedings have presented that issue to the  
4 Librarian for decision?

5 A No.

6 Q Have you been made aware that the  
7 1998 pre-existing services CARP proceeding  
8 actually made a determination that  
9 SoundExchange's argument that the sound  
10 recording performance right is more valuable  
11 than a musical works performance right was  
12 rejected?

13 A No. My understanding was that  
14 they found there wasn't enough evidence that  
15 was actually given by each side to make a  
16 determination on the issue.

17 Q Let's take a look, then, at  
18 whether that understanding is correct and  
19 whether this helps you understand in any  
20 greater detail what was and what did and  
21 didn't happen. I'm not suggesting that what  
22 is in here is directly contrary to what you

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1 said, but I want to see whether this helps you  
2 better frame your last answer.

3 Take a look at page 25404, at the  
4 bottom righthand column, do you see where it  
5 says, "RIAA faults the panel for its lack of  
6 discussion on the question of whose rights in  
7 the phono record are more valuable" -- and  
8 that's referring to musical work versus sound  
9 recording. And it goes on to say, "While the  
10 Registrar agrees that the panel did not make  
11 specific citations to record evidence, its  
12 finding that there was insufficient and  
13 conflicting evidence to make a determination  
14 that the performers and record companies  
15 deserve a larger percentage from the services  
16 than granted to the musical works was  
17 supported by the record evidence."

18 Then if you turn to the righthand  
19 column on the same page now, 25405, do you see  
20 the first paragraph there? It states, "Based  
21 on a review of the record evidence, the  
22 Registrar concurs with the panel's conclusion



1 that there was insufficient evidence to  
2 determine that the performers and record  
3 companies deserve a larger percentage from the  
4 services than that received by the copyright-  
5 holders in the musical workers. That being  
6 so, the Registrar finds no basis for making an  
7 upward adjustment to the musical works  
8 performance license fees to establish a  
9 broader range of potential rates."

10 Is that consistent with your  
11 recollection of what you understood had  
12 happened in the PES case on that?

13 A That there was insufficient  
14 evidence presented?

15 Q And that RIAA had argued that  
16 there should be a higher value on the sound  
17 recording performance right compared to the  
18 musical work performance right but failed to  
19 submit sufficient evidence to support that  
20 conclusion?

21 A Again, you're reading this for the  
22 first time for me.

1 Q Well, again, sticking with your  
2 testimony that the musical works fees as a  
3 benchmark has been rejected in the prior CARP  
4 or CARPs, turn, if you would, to what I'll  
5 mark as Services Exhibit 85, which is an order  
6 from the last CARP proceeding dated July 18,  
7 2001. By "last CARP proceeding," I mean the  
8 webcaster CARP proceeding.

9 [Whereupon, the document  
10 was marked as Services  
11 Exhibit 85 for  
12 identification.]

13 Q Do you recall that in the prior  
14 CARP proceeding there was a pre-trial motion  
15 about whether or not the musical work  
16 benchmark could be advanced or not in that  
17 case?

18 A I actually don't recall that  
19 particular motion.

20 Q Well, take a look, if you would,  
21 at the last page of this exhibit where the  
22 Registrar states, quote, "The musical work

1 fees benchmark identified in a previous rate  
2 adjustment proceeding as the upper limit on  
3 the value of the performance of a sound  
4 recording may or may not be adopted as the  
5 outer boundary of the zone of reasonableness  
6 in this proceeding. This is a factual  
7 determination to be made by the CARP based  
8 upon its analysis of the record evidence in  
9 this proceeding."

10 Does that comport with your  
11 recollection of what the Registrar of  
12 Copyrights ruled on that issue?

13 A Are you on page 3?

14 Q Yes, the last page of the exhibit,  
15 the last paragraph.

16 A I see that. Okay.

17 Q You wouldn't characterize that as  
18 having rejected the musical works benchmark,  
19 would you?

20 A Not that particular language, no.

21 Q Now in the actual Librarian  
22 decision after the trial in the first

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1 webcaster case, you're familiar with the fact  
2 that the Librarian made it clear that,  
3 although the panel was not obligated to do so,  
4 the panel could have utilized the musical  
5 works benchmark in making its decision and  
6 simply adjusted for whatever assumptions  
7 needed to be accounted for?

8 A Yes.

9 Q And that's not the same as having  
10 rejected the musical works benchmark, is it?

11 A Well, they didn't use it, but I  
12 guess it's got in here. So I guess you're  
13 saying they didn't reject it.

14 MR. STEINTHAL: I have no further  
15 questions, Your Honor.

16 CHIEF JUDGE SLEDGE: All right,  
17 any further questions of Mr. Simson?

18 MS. ABLIN: Your Honor, this is  
19 Karyn Ablin on behalf of the radio  
20 broadcasters. I have a number of questions of  
21 Mr. Simson.

22 CHIEF JUDGE SLEDGE: Thank you.

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CROSS EXAMINATION

BY MS. ABLIN:

Q Good afternoon, Mr. Simson.

A Good afternoon.

Q I join Mr. Steinthal in hoping  
that you had a nice trip to Greece. You look  
tanned and rested.

A No, it was meetings though.

(Laughter.)

Q Hopefully, you had a little bit of  
time to enjoy the scenery.

My name, as I said, is Karyn  
Ablin, and I'm here on behalf of the radio  
broadcasters, and we'll be spending a little  
bit of time this afternoon chatting.

Because so much time has passed  
from the last time that you had appeared as a  
witness here, I just wanted you to reaffirm  
for the record that, because you were under  
cross that whole time, that you have not had  
any conversations about your testimony with  
lawyers from Jenner or lawyers of the

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1 SoundExchange.

2 A That's correct.

3 Q Okay, and you have not talked  
4 about your testimony with Ms. Kessler, who is  
5 scheduled to appear as a witness in this  
6 proceeding?

7 A I have not.

8 Q Have you spoken with anyone else  
9 that's not a lawyer or not a witness about  
10 your testimony in this proceeding?

11 A I was driving my wife crazy for  
12 about three days.

13 (Laughter.)

14 Q I'm sure she's subject to some  
15 spousal immunity and privilege.

16 Okay. Now I believe that you  
17 stated in your written statement that for many  
18 releases the production and promotion costs  
19 can easily reach several million dollars for  
20 a single sound recording.

21 A That's correct.

22 Q I was going to say, we could look

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1 at your statement if that doesn't ring a bell.

2 Is it fair to say that the  
3 promotion cost alone could reach several  
4 million dollars for a single sound recording?

5 A It can.

6 Q I believe you also stated in your  
7 written statement that to promote the sound  
8 recording record labels must pay high prices  
9 for public relations, concert tours, tour  
10 support, music videos, marketing campaigns,  
11 and other promotional devices such as posters  
12 and store displays. Do you remember --

13 A That's correct, yes.

14 Q I notice that you didn't mention  
15 radio promotion. Radio promotion would also  
16 be a significant way for record companies to  
17 promote sound recording?

18 A It certainly is a major cost.

19 Q To your knowledge -- you work with  
20 record labels a lot, I take it, in your  
21 capacity as Executive Director of  
22 SoundExchange?

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1 A That's correct.

2 Q And are you aware whether, do  
3 those labels pay significant sums of money, in  
4 fact, to promote sound recordings to  
5 terrestrial radio?

6 A Well, I should say that they don't  
7 really talk to me anymore about that in my  
8 capacity. My knowledge and understanding of  
9 that is really more when I was managing  
10 artists seven or eight years ago.

11 Q Fair enough. With that caveat,  
12 are you aware whether labels spend significant  
13 sums of money --

14 A They do.

15 Q -- in fact, to promote to radio?

16 Now switching gears just a little  
17 bit, it's true, is it not, that many  
18 performing artists are willing to give away  
19 the sound recording performance rights or  
20 allow their works to be performed for free in  
21 exchange for the value of being performed on  
22 certain webcasting services, right?

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1 A There are some performers who I've  
2 heard have done that.

3 Q Now are you familiar with an  
4 organization called GRAMEX, G-R-A-M-E-X

5 A There are two organizations called  
6 GRAMEX. They are the performing rights  
7 organization for both Denmark and there's also  
8 GRAMEX Finland. So there are two.

9 Q And the one for Denmark, GRAMEX in  
10 Denmark, what is their role?

11 A They are similar to SoundExchange  
12 in that they license and collect public  
13 performance in Denmark.

14 Q In doing that, they represent both  
15 performers and record labels?

16 A That is correct.

17 Q I believe you testified when you  
18 were here last, you testified about IFPI,  
19 correct?

20 A Yes.

21 Q What is IFPI?

22 A The International Federation of

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1 Phonographic Industries. It's a trade  
2 association, the worldwide trade association  
3 representing record companies, record  
4 producers worldwide.

5 Q Now you mentioned earlier, again,  
6 when you were here last, I believe you alluded  
7 to a study that was done in Denmark concerning  
8 a possible linkage between radio, airplay, and  
9 CD sales? Do you recall that?

10 A Correct. There was a study done  
11 in Denmark.

12 Q Were you aware that that study was  
13 commissioned by GRAMEX and IFPI Denmark?

14 A Yes, I was.

15 Q Okay. Now you've also testified  
16 in your written statement that, even if there  
17 were an argument that webcasting promoted  
18 sales of sound recordings, that would provide  
19 no reason to forego compensating record labels  
20 and record artists fully for the value of the  
21 works that webcasters use, correct?

22 A That's correct.

1 Q Now you're not suggesting by that  
2 statement, are you, that the extent to which  
3 the various webcasting services promote sound  
4 recording sales is totally irrelevant to the  
5 Board's rate-setting inquiry, are you?

6 A My personal feeling is that in a  
7 compulsory statutory license where someone can  
8 play whatever they want and not play the track  
9 that you're trying to promote, it should not  
10 be considered.

11 Q In fact, it is a statutory factor?

12 A I see that it is, but my personal  
13 feeling is that when you can play whatever you  
14 want, it shouldn't be.

15 Q Okay, but you are aware that it  
16 is, in fact, the law?

17 A I am aware of that.

18 Q Okay. Would you agree that  
19 assuming an economically-rational act or a  
20 willing record label seller who desires to  
21 maximize its profits might agree to license  
22 its music to a webcasting service at a lower

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1 rate if it were sure, through empirical  
2 studies or otherwise, that it would make more  
3 money in the aggregate from that lower rate as  
4 a result of increased CD sales than it might  
5 from getting a higher performance rate with  
6 lower CD sales?

7 MR. SMITH: Your Honor, I'm going  
8 to object to the question. I don't know how  
9 anybody could follow all the various clauses  
10 and hypotheticals in that question.

11 CHIEF JUDGE SLEDGE: Ms. Ablin?

12 MS. ABLIN: Let me try to rephrase  
13 that.

14 BY MS. ABLIN:

15 Q Do you agree, Mr. Simson, that  
16 record labels desire to maximize their  
17 profits?

18 A Yes.

19 Q And in maximizing their profits --  
20 let's see how we can do this. If they were  
21 forced to choose between a higher amount of  
22 profits or a lower amount of profits that come

1 from different revenue streams, which would  
2 they choose?

3 A Again, I think every record  
4 company may make a different choice, so I  
5 don't want to speculate on that. I think it's  
6 just too speculative.

7 Q Okay. So you're saying there  
8 might be some record labels that might not  
9 want to maximize their profits?

10 A Well, they may make decisions on  
11 different bases. I mean they may have a  
12 political reason why they want to do something  
13 versus something. I think it's just way too  
14 speculative for me to answer.

15 Q Okay, fair enough. Okay, let's  
16 switch gears for a minute then.

17 The copyrightable elements of the  
18 sound recording, which I want to talk about  
19 for a few minutes here, there are only those  
20 portions that show some sort of creativity or  
21 originality, right?

22 A The performance on the sound

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1 recording of the musicians and the performers,  
2 yes.

3 Q In order to get a copyright,  
4 there's got to be at least a modicum of  
5 originality in the copyrighted work?

6 A I mean that's what the Copyright  
7 Act says.

8 Q And I believe you stated in your  
9 testimony that there are two groups, two  
10 separate groups, that make copyrightable  
11 contributions to a sound recording, performers  
12 and record labels or record producers?

13 A On the one hand, and then -- are  
14 you talking about the difference between the  
15 musical work --

16 Q No, I'm talking about --

17 A Oh, I see.

18 Q I believe you stated in your  
19 testimony that there are two groups.

20 A Sure. The performers who make the  
21 recordings and the owners who invest in them.

22 Q Yes. And the performers'

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1 copyrightable contribution, which I believe  
2 you described in there, in your statement, is  
3 the performance itself? That's their  
4 copyrightable contribution?

5 A Correct.

6 Q And the record producers'  
7 copyrightable contribution is, and this is a  
8 quote from your statement that we can look at  
9 if it doesn't sound familiar, "setting up the  
10 recording session, capturing and  
11 electronically processing the sounds, and  
12 compiling and editing them to make the final  
13 sound recording."

14 A That sounds like my testimony.

15 Q Okay. In fact, there could be  
16 cases, couldn't there, where a record owner's  
17 creative contribution is so minimal that the  
18 performance is the only copyrightable element  
19 in the sound recording?

20 MR. SMITH: Objection. Calls for  
21 speculation, Your Honor.

22 CHIEF JUDGE SLEDGE: Ms. Ablin?

1 MS. ABLIN: Let me perhaps go  
2 about this a different way then. I would like  
3 to show the witness a document.

4 CHIEF JUDGE SLEDGE: All right.

5 MS. ABLIN: Just one moment, Your  
6 Honor.

7 [Whereupon, the document  
8 was marked as Services  
9 Exhibit 86 for  
10 identification.]

11 BY MS. ABLIN:

12 Q Mr. Simson, I'm about to hand you,  
13 I am handing you, rather, an exhibit that has  
14 been marked as Services Exhibit 86. It's a  
15 House report that I believe you cited to  
16 extensively in your testimony. It's No. 94-  
17 1976. This is just the first few pages. I'm  
18 not burdening people with a 100- or 200-page  
19 full-length version.

20 If you could turn to page 7 of  
21 this exhibit? First of all, do you recognize  
22 this report as the report that you quoted in



1 your statement a few times?

2 A I do.

3 Q You do. If I could direct your  
4 attention to the fourth paragraph of page 7 in  
5 this exhibit, which again this is the House  
6 report, right, from the Committee on the  
7 Judiciary in connection with the Copyright  
8 Act?

9 A Right.

10 Q Yes. Do you see the statement  
11 there that the House Committee made that says,  
12 "There may, however, be cases where the record  
13 producer's contribution is so minimal that the  
14 performance is the only copyrightable elements  
15 in the work."?

16 A I do.

17 Q Okay. So, at a minimum, Congress  
18 determined at one point that that statement  
19 was true, correct?

20 A It's true, certainly.

21 CHIEF JUDGE SLEDGE: Now wait a  
22 minute. A House report statement equals a

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1 determination by Congress?

2 MS. ABLIN: Well, at a minimum --

3 CHIEF JUDGE SLEDGE: As said by  
4 this witness?

5 MS. ABLIN: Fair enough.

6 BY MS. ABLIN:

7 Q At a minimum, the House Judiciary  
8 Committee that issued the official report that  
9 accompanied the Copyright Act made this  
10 determination, correct?

11 A That is correct.

12 Q Now I believe you also stated in  
13 your written testimony that, "Ownership of the  
14 copyright in a sound recording is  
15 distinguished from ownership of the material  
16 object in which the sound recording is  
17 fixed."? Does that ring a bell?

18 A Can you restate that?

19 Q Certainly. I believe you stated  
20 in your testimony that, quote, "Ownership of  
21 the copyright in a sound recording is  
22 distinguished from ownership of the material

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1 object in which the sound recording is  
2 fixed."?

3 A Yes. That's correct.

4 Q So, in other words, if someone  
5 owns a physical copy of a CD, that does not  
6 give them the copyright ownership in the CD?

7 A That's correct. It doesn't give  
8 the right to put it in a movie or use it for  
9 whatever they want.

10 Q So there's no copyright that  
11 subsists in that physical copy? The  
12 copyright, it's in the sound recording that's  
13 embodied on the physical product, but, as you  
14 just said, owning the physical product itself  
15 does not --

16 A Doesn't give you ownership of the  
17 copyright, correct.

18 Q Yes, okay. Now costs associated  
19 with manufacturing the physical product as  
20 opposed to creating the master recordings that  
21 go on that product, those are not input costs  
22 into the creation of the copyrighted sound

1 recording, the master recording, are they?

2 A So you're talking about the known  
3 facts, the jewel box, the covers --

4 Q Yes.

5 A -- all of that stuff that you send  
6 out to the public?

7 Q And the CD itself, the physical  
8 CD, not what goes on it.

9 A Correct. You've already recorded  
10 the master recording and that's finished.

11 Q Correct. So those manufacturing  
12 costs are not input costs into the  
13 copyrightable portion of that?

14 A Well, they're certainly  
15 investments into making the copyright valuable  
16 because --

17 Q But they're not -- I guess what  
18 I'm getting at is they're not input costs into  
19 the copyrighted work itself? They're not  
20 inputs?

21 MR. SMITH: Asked and answered at  
22 this point, Your Honor. He has just answered

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1 that question two questions ago. Why are we  
2 asking that same question?

3 CHIEF JUDGE SLEDGE: Ms. Ablin?

4 MS. ABLIN: I'm sorry, I don't  
5 believe I caught his answer.

6 BY MS. ABLIN:

7 Q If you could restate your answer?

8 A All right. Well, what I said  
9 before was that, once you've paid for the  
10 record, you've paid for the copyrightable  
11 work. These costs are investments in making  
12 that copyright valuable.

13 Q But they're not costs associated  
14 with creating the master track?

15 A That's correct.

16 Q Okay. And the same would be true  
17 for costs of making the package insert, the  
18 liner notes?

19 A That would be true.

20 Q And the same would also be true  
21 with respect to distribution costs for the  
22 product?

1 A Correct.

2 Q And also the same would be true  
3 with respect to promotion costs of the  
4 product? They might make the album --

5 A True.

6 Q -- more successful, but they're  
7 not inputs into the master recording?

8 A As a business, I think you're  
9 going to -- that is the way you're going to  
10 look at whether you have a successful  
11 copyright or not or what your investment is in  
12 it and what your return is.

13 Q Sure, sure.

14 A So I'm not sure you can really  
15 sever that, but, again, you've created your  
16 copyright. If you want to just have it sit  
17 there, you can do that.

18 Q Right. It's already been created  
19 by the time you're promoting it. Well, I  
20 suppose you could promote it earlier, but  
21 they're not necessarily linked?

22 A That's correct. There could be

1 additional costs because you could have  
2 remixes or different versions of the actual  
3 sound recording, which would be separately  
4 copyrighted themselves. So, for example,  
5 frequently now you'll have -- there's the  
6 album version and now we have a single  
7 version, which is going to be different than  
8 the album. There might be some guest artists  
9 or a remix by a well-known producer with  
10 additional costs. So, you know, in promoting  
11 a recording, you could have additional cost  
12 into the sound recording copyright itself.

13 Q I'm not sure I followed that. You  
14 could have promotion costs that go into  
15 actually creating the master tracks --

16 A Well, you create a master  
17 recording. Let's say it's an album, and let's  
18 say there's a focus single track, and you  
19 decide that you want to make it even more  
20 special for radio or for the fans, and so you  
21 create a separate version with a couple of  
22 guest artists or you change some of the

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1 instrumentation. It's called a remix. You  
2 would have maybe a well-known producer or a DJ  
3 who would actually remix it, and you would  
4 have a lot of additional costs in that.  
5 Again, it's from the same recording.

6 Q Okay, but those would be mixing  
7 costs in creating a new work as opposed to,  
8 you know, hey, buy-this-new album costs?

9 A Well, again, you're creating more  
10 cost in the sound recording. So I think it's  
11 a little hard to sometimes draw a line and say  
12 these are; these aren't.

13 Q Okay, but the costs you were just  
14 mentioning, just so I understand, you were  
15 talking about costs invested in creating a new  
16 version --

17 A Correct.

18 Q -- a new copyrighted sound  
19 recording? Okay.

20 Now on risk of stating the very  
21 obvious, this is a copyright proceeding that  
22 we're involved in, correct?

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1 A Yes.

2 Q And we're here to present evidence  
3 so that the Board can value the digital  
4 performance rights in transmitting songs,  
5 sound recordings, via digital audio  
6 transmission for the services under the  
7 statutory licenses we're valuing here?

8 A Correct.

9 Q Okay. Now I believe you also  
10 stated in your written testimony that the  
11 broad Section 106, Sub 4, performance right  
12 does not extent to sound recordings?

13 A That is correct.

14 Q I believe you also characterized  
15 that as, quote, "an anomaly" that is primarily  
16 a product of history?

17 A Yes.

18 Q It's true, isn't it, again on risk  
19 of stating the obvious, that Congress is the  
20 institutional body that's been set up to enact  
21 copyright law?

22 A That's correct.

1 Q And in that legislative process,  
2 various groups, because we are in a democracy,  
3 are free to weigh-in to lobby their  
4 Representatives and their Senators for various  
5 bits of legislation, correct?

6 A Correct.

7 Q Or, for that matter, to oppose  
8 bits of legislation that they don't like. And  
9 that would include record labels and artists,  
10 right? Record labels and artists are free to  
11 lobby Congress on behalf of, to support  
12 certain legislation?

13 A Every citizen is.

14 Q So they, in fact, had -- record  
15 labels and artists, if they so chose to  
16 exercise them, had the same rights of access  
17 as radio broadcasters did to Congress in  
18 passing copyright laws?

19 A Well, radio broadcasters have a  
20 little more power, and that's why we don't  
21 have a performance right.

22 Q Well, but record labels, at least

1 you would agree, were free to go in and knock  
2 on the door and talk to their Representatives  
3 and Senators?

4 A And they've tried many times.

5 Q And the recording industry, in  
6 fact, spends lots of money every year, does it  
7 not, in lobbying?

8 A I think it pales in comparison to  
9 the NAB's spending.

10 Q But it spends a lot?

11 A It does spend some money.

12 Q It spends money. Do you have any  
13 reasonable educated estimate on how much money  
14 a year --

15 A I actually have no idea how much  
16 they spend. It's not part of -- I don't --

17 Q Fair enough.

18 I guess the bottom line, the end  
19 result of the legislative process that led to  
20 the 1995 grant of the limited performance  
21 right was Congress decided not to grant a  
22 performance right to terrestrial radio --

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1       sorry -- for terrestrial radio broadcasts?  
2       They were not subject to the digital  
3       performance right, correct?

4               A       That is correct.

5               Q       And that includes both their  
6       analog transmissions and their digital  
7       transmissions made over the air?

8               A       That's correct.

9               Q       Mr. Simson, are you familiar with  
10      the Senate Judiciary Committee report that  
11      accompanied the 1995 Digital Performance  
12      Rights and Sound Recordings Act?

13              A       Actually, I'm not. I may have  
14      seen it at some point with the DPR, but I  
15      really don't recall.

16              Q       I thought you might be since you  
17      held yourself out to be a copyright law expert  
18      and cited to other reports, other legislative  
19      reports.

20              A       No. Actually, during 1995, as I  
21      said, I actually was managing artists and  
22      actually did get a number of artists to get

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1 involved in the campaign.

2 Q Well, we're going to hand that  
3 report out, so you can take a look at it.

4 [Whereupon, the document  
5 was marked as Services  
6 Exhibit 87 for  
7 identification.]

8 Q Right now I'm handing you a  
9 document that's been marked as Services  
10 Exhibit 87. It is, in fact, the Senate Report  
11 No. 104-128 which accompanied the Digital  
12 Performance Right and Sound Recording Act of  
13 1995.

14 If you could turn to page 15 of  
15 this report? I would like to direct your  
16 attention to the first full paragraph on here,  
17 which I'll just read the first sentence there.

18 It states that, "This legislation  
19 is a narrowly-crafted response to one of the  
20 concerns expressed by representatives of the  
21 music community; namely, that certain types of  
22 subscription and interactive audio services

1 might adversely affect sales of sound  
2 recordings and erode copyright owners' ability  
3 to control and be paid for use of their work."

4 Do you see that?

5 A I do.

6 Q Is that consistent with your  
7 recollection of the 1995 passage of the DPRA?

8 MR. SMITH: I object to the  
9 question, Your Honor. I don't know what it  
10 means to say something's consistent with the  
11 passage of the DPRA.

12 CHIEF JUDGE SLEDGE: Objection  
13 sustained.

14 BY MS. ABLIN:

15 Q You testified a lot, Mr. Simson,  
16 in your statement about copyright law and  
17 about the passage of the digital public  
18 performance right, did you not --

19 A I did.

20 Q -- in your statement?

21 For example, on page 13, if you  
22 have your statement there, or I could just --

1 if you want to turn to it, it's the last  
2 partial paragraph.

3 A Uh-hum.

4 Q You discuss that, "With the advent  
5 of the internet and the many challenges it has  
6 posed, that Congress did grant to sound  
7 recording copyright owners an exclusive right  
8 to publicly perform works." Later you say,  
9 "The DPRSA established this right in 1995."  
10 Right?

11 A Correct.

12 Q And you were referring to the act  
13 that we have been talking about that this  
14 report accompanied, correct?

15 A That's correct.

16 Q Were you aware, then, of when this  
17 Act was passed, what some of the  
18 considerations were on the Committee that  
19 caused Congress not to enact a performance  
20 right that covered radio?

21 A No.

22 Q You were not aware?

1 A I was not.

2 Q So, as far as you're concerned, it  
3 was just something that the broadcasters asked  
4 for and they got, for no good reason?

5 A I really can't speculate on that.

6 Q Okay. So you just don't know  
7 anything about this report?

8 A I don't, actually.

9 Q Okay. Well, would it surprise you  
10 to know that one reason that's listed in this  
11 report, that free over-the-air broadcasts are  
12 available without subscription, that that  
13 might have been a reason listed in here for  
14 not giving terrestrial radio a performance  
15 right?

16 MR. SMITH: Objection, Your Honor.

17 CHIEF JUDGE SLEDGE: Sustained.

18 Ms. Ablin, what's said in a  
19 congressional report is not evidence as to  
20 what the statute is, and what somebody  
21 understands about a report does not establish  
22 any evidence that we can consider about a

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1 statute.

2 MS. ABLIN: I guess that's true,  
3 Your Honor, if you're Justice Scalia. I mean,  
4 obviously, lots of courts consider legislative  
5 history when they are interpreting statutes,  
6 but I can move on.

7 CHIEF JUDGE SLEDGE: Please.

8 BY MS. ABLIN:

9 Q Are you familiar with the term  
10 "radio simulcasting"?

11 A Yes, if you mean simulcasting  
12 where a radio is transmitting a signal at the  
13 same time over the internet?

14 Q Yes.

15 A Yes.

16 Q Yes. And when that occurs, is  
17 your understanding that the signal over the  
18 internet contains identical programming to the  
19 signal over the air?

20 A Yes. I think there may be some  
21 issues of commercials, but --

22 Q But other than --

1 A Essentially, it's the same.

2 Q Other than commercials, it's the  
3 same?

4 A Uh-hum.

5 Q To your knowledge, radio  
6 simulcasts are available for free without a  
7 subscription? People can just go on and hear  
8 a radio station on the air that they're  
9 equally able to hear -- I'm sorry. They can  
10 go on the internet and hear a radio station,  
11 assuming it streams, and hear the same  
12 programming for free that they can hear for  
13 free over the air?

14 A Certain stations, that's correct.

15 Q The simulcasts are not  
16 interactive, correct? They're not  
17 interactive?

18 A That's correct.

19 Q Because the programming's the  
20 same, they would provide -- you would hear,  
21 barring a few ad substitutions perhaps, you  
22 would hear the same mix of entertainment and

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1 non-entertainment programming that a radio  
2 station puts together in compliance with its  
3 FCC license, correct? It would be the same  
4 programming?

5 A That's correct.

6 Q That they're packaging for their  
7 over-the-air broadcasts?

8 A On the simulcast channels, right.

9 Q On the simulcasts.

10 I believe you stated -- I just  
11 want to find out a little bit more about the  
12 18-member Board of Directors of SoundExchange.  
13 I believe you said there were 18 members?

14 A That's correct.

15 Q And nine of those members  
16 represent the labels and nine represent the  
17 artists, is that correct?

18 A That's correct.

19 Q With respect to the nine seats  
20 that represent the labels, and this is just  
21 more for my benefit --

22 A Sure.

1 Q -- I take it four of the seats are  
2 occupied by the major labels; namely, Warner,  
3 EMI, Sony, Sony BMG rather, and Universal?

4 A That's correct. There's actually  
5 a fifth seat that the major labels designate.  
6 Because, originally, when we started there  
7 were five major labels, so they had five  
8 seats. When there was the consolidation, the  
9 four remaining majors got to choose and  
10 designate the fifth seat. So it's actually  
11 five major label seats. They designate a  
12 fifth, and then there's a sixth. Then there's  
13 three independent label seat and one RIAA  
14 seat.

15 Q Who is in the fifth major label  
16 seat?

17 A The major is designated Steven  
18 Marks, who's the General Counsel at the RIAA,  
19 to serve for this three-year period.

20 Q Okay, and then the sixth seat is  
21 also occupied by a member of the RIAA?

22 A Correct.

1 Q Just for the record, his title is?

2 A I believe he's President of the  
3 RIAA.

4 Q Okay. The three independent label  
5 seats are?

6 A Well, Tony Silverman from Tommy  
7 Boy Records.

8 You have Don Rose, who's an  
9 executive running an association of about 200  
10 independent labels. So it's called the  
11 Association of American Independent Music, and  
12 they're a trade group like the RIAA, except  
13 their constituency are 200 of the largest U.S.  
14 independent labels.

15 Then the third seat is held by a  
16 small independent, and that's Dick Huey, who  
17 works at Matador Records. Dick's also worked  
18 over the years for Righteous Babes and a  
19 number of other independent labels.

20 Q Okay. You talked a lot in your  
21 testimony about the song "I Will Always Love  
22 You," I believe? Yes?

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1 A Yes.

2 Q I believe you said it was written  
3 by Dolly Parton and performed by, among other  
4 people, both Dolly Parton in one version and  
5 Whitney Houston in another version?

6 A That's correct. That's true.

7 Q In fact, when Whitney Houston  
8 performed the song, she did it at a point in  
9 time that was much later than when the song  
10 was actually written?

11 A That's correct. It was probably  
12 15 or 16 years at least.

13 Q So she actually created not only a  
14 different sound recording, but she -- well,  
15 let me back up.

16 Are you familiar with the two  
17 performances?

18 A I am.

19 Q So when Whitney Houston rendered  
20 her performance, it was not only a different  
21 song recording that she created, but she  
22 performed a different arrangement, correct?

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1 A That's correct.

2 Q And different musical arrangements  
3 of a musical composition are entitled to  
4 separate copyrights, correct?

5 A They are. It rarely happens  
6 because the original owner of the musical work  
7 is usually not very happy about creating a  
8 derivative work from it. So in that  
9 particular instance, I don't believe you would  
10 have a separate musical work copyright for  
11 that arrangement.

12 Q Okay. Well, let's --

13 A The arranger probably got paid to  
14 do the arrangement.

15 Q We're going to just take a quick  
16 look at something else here. While we're  
17 waiting for this exhibit to get marked, if you  
18 could take a look at an exhibit I believe that  
19 you've sponsored in, which is 209, which I  
20 believe is the sheet music for "I Will Always  
21 Love You," if you could just turn to that?

22 A Now the sheet music for which?

1 Q For "I Will Always Love You."

2 A And you say it's 209?

3 Q 201, I'm sorry. If I said 209, I  
4 was wrong.

5 A Okay.

6 Q If you could just flip to the  
7 second page there, and you see the notation at  
8 the bottom of that page, it says, "This  
9 arrangement copyright 1982" by Velvet Apple  
10 Music?

11 A Correct.

12 [Whereupon, the document  
13 was marked as Services  
14 Exhibit 88 for  
15 identification.]

16 Q Now I'm going to hand you another,  
17 a document that has been marked as Services  
18 Exhibit 88. If you could just compare -- it's  
19 also sheet music for "I Will Always Love You."

20 A Uh-hum.

21 Q If you could just compare the  
22 notes and the key and whatnot to the exhibit

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1 in your book and tell me, are they identical  
2 or are they different?

3 A Well, it's in a different key. I  
4 thank my music teacher for this. But if you  
5 notice, the copyright is the same company.  
6 Velvet Apple Music has the copyright '73, '82  
7 for the Dolly Parton arrangement, and then '92  
8 for the Whitney Houston arrangement.

9 Q Yes, so I guess my only point is  
10 this, the exhibit that I just handed out, as  
11 you just correctly pointed out, actually has  
12 a separate copyright because it's a separate  
13 arrangement, and that copyright was issued in  
14 1992, correct?

15 A Correct.

16 Q As opposed to the version that was  
17 attached to your testimony, which was  
18 copyrighted in 1982?

19 A That's correct.

20 Q The arrangement was.

21 Turning to another topic, we'll  
22 move past the sheet music. I believe you also

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1 stated in your testimony that "SoundExchange  
2 is committed to improving our collection  
3 processes and lowering administrative expenses  
4 to ensure that every artist and record label  
5 receives the maximum possible amount for the  
6 performance of their creative works."?

7 A That's correct.

8 Q And you also stated, I believe,  
9 you included a statement, rather, from the  
10 Librarian of Congress in your statement that  
11 says that, "SoundExchange only deducts  
12 necessary distribution costs from the  
13 SoundExchange royalties," sound recording  
14 royalties it collects?

15 A I don't believe that's correct. I  
16 think we deduct for licensing collection and  
17 distribution cost.

18 Q Okay. Let's just turn to your  
19 testimony quickly to clarify this. It's page  
20 39. Let's see if I can find this.

21 Do you see item 2 on page 39  
22 there? The first sentence says,

1 "SoundExchange is a non-profit organization  
2 that will deduct only necessary distribution  
3 costs." So that's no longer true, I take it,  
4 from what you just told us?

5 A Well, I think what you're taking  
6 is just a quote that was used for a particular  
7 purpose. I believe that it is set out more  
8 fully what expenses we do take.

9 Q Sure.

10 A So to the extent that it says only  
11 distribution cost, it's wrong.

12 Q Well, in fact, it may have been  
13 true at one point because, in fact, the law  
14 changed to allow SoundExchange to deduct more  
15 expenses than it initially was able to.

16 A But it was never just limited to  
17 distribution cost.

18 Q Okay. But, in any event, there  
19 are other costs besides strictly under the  
20 narrow definition of the word "distribution  
21 costs" --

22 A Correct.

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1 Q -- that are deducted, correct?

2 A Correct.

3 Q I believe, as you said, one of  
4 those costs is attorneys' fees and related  
5 expenses for participating in royalty rate-  
6 setting proceedings such as this? That's a  
7 cost that is deducted?

8 A It certainly is.

9 Q That comes out of the royalties, I  
10 guess, sort of off the top before the money is  
11 then further distributed to the labels and the  
12 artists?

13 A Well, it's amortized over the  
14 period of the license for which it is spent to  
15 make it more fair over the five years, for  
16 example, of the upcoming license.

17 Q Okay. I'm going to hand out  
18 another document here, so we can go into a  
19 little more detail about the expenses that get  
20 deducted.

21 MS. ABLIN: We're marking now  
22 Services Exhibit 89. It's going to be

1 SoundExchange's annual report for the period  
2 April 1st, 2003 through March 31st, 2004,  
3 which was produced to us by the company in  
4 production, in discovery.

5 [Whereupon, the document  
6 was marked as Services  
7 Exhibit 89 for  
8 identification.]

9 BY MS. ABLIN:

10 Q Are you familiar with this  
11 document, Mr. Simson?

12 A Yes.

13 Q Did you help in creating this  
14 document?

15 A I did.

16 Q If you could turn to the page  
17 that's Bates numbered SX76670, I believe at  
18 the back, and you see there are expenses that  
19 are set forth for the time period that the  
20 report covers --

21 A Uh-hum.

22 Q -- you know, for personnel

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1 operating expenses, member services, licensing  
2 and legal, and royalty assistance. Could you  
3 just explain to all of us what goes into each  
4 of these elements of expense?

5 A Sure.

6 Q What triggers the cost?

7 A You'll get a much better  
8 explanation from Ms. Kessler since she's run  
9 the day-to-day operations.

10 Q Okay, well, just the 30,000 --

11 A But, yes, I mean the big approach,  
12 the personnel is obviously all the different  
13 people in the departments, whether it's the  
14 royalty, the people who collect the royalties  
15 and process the royalties, whether it's the  
16 floor people who work processing the data that  
17 comes in from services. So we get logs that  
18 come in and we figure out what's being played.

19 We match, typically -- it depends  
20 on service, but 92, 94 percent, but 6 percent  
21 of hundreds of millions of performances is  
22 still a lot of performances that you have to

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1 do manual research on. We have people who --  
2 we now are up to 12,000 artists, and that's a  
3 lot of artists to provide service to.

4 So we have a staff of people who  
5 handle their inquiries and their phone calls  
6 from their business managers, from their  
7 lawyers, making sure that their paperwork is  
8 right, making sure -- and, of course, they're  
9 always interested in the royalties that we're  
10 starting to get from Europe, which haven't  
11 come before.

12 Member services is also about  
13 outreach, so to make sure people know what  
14 we're doing and are aware of their royalties.  
15 It's interesting to me that there are still  
16 many people who are unaware of this royalty.  
17 So we spend a fair amount of time and effort  
18 to get out the word about performance  
19 royalties.

20 Frequently, it's heirs or  
21 grandchildren of people who created great  
22 recordings in the twenties and thirties. They

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1 don't have entertainment lawyers anymore or  
2 agents or people like that, so they're not  
3 going to be as familiar with new changes in  
4 the law. So when they find out there's a new  
5 revenue stream for their valuable recordings,  
6 they're extremely excited. It's a wonderful  
7 thing when you have those kinds of  
8 experiences. That's what member services  
9 does.

10 Licensing and legal, obviously, is  
11 these kinds of proceedings. Obviously, I wish  
12 that was zero, but it's not.

13 And we have other legal issues  
14 like audits to make sure people are paying us  
15 the right amount.

16 Royalty systems is the cost of  
17 building very sophisticated systems to process  
18 -- I think Ms. Kessler, again, will have the  
19 exact numbers, but I think we're over 700  
20 million track-level performances. Typically,  
21 these are very minute calculations, and it's  
22 a very sophisticated system with credits and

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1 adjustments and things of that nature.

2 Q Just kind of eyeballing the totals  
3 here, approximately, if you add up these five  
4 numbers, you're just under \$3 million in  
5 expenses?

6 A Correct.

7 Q I want to back up and talk just  
8 for a minute about the licensing and legal  
9 expenses. Did I just hear you testify that  
10 this line item would include costs incurred in  
11 participating in rate-setting proceedings such  
12 as this?

13 A That's correct.

14 Q Well, I'm a little bit confused  
15 about something then. Because if you look  
16 down at the next section entitled,  
17 "Administrative Rate," the third sentence  
18 there, I'll just read it to you to see if  
19 we're both on the same page literally.

20 "If SoundExchange's administrative  
21 rate is less than 20 percent, SoundExchange  
22 shall pay the difference between its

1 administrative rate and 20 percent to repay  
2 the principal and interest outstanding on the  
3 promissory note entered into with the  
4 Recording Industry Association of America,  
5 Inc., or RIAA, for the repayment of costs  
6 incurred in the initial arbitrations to  
7 establish rates and terms for pre-existing  
8 subscription services and eligible non-  
9 subscription transmission services for fiscal  
10 year 2004. SoundExchange repaid \$415,685 in  
11 principal and interest to the RIAA."

12 That sounded to me as if the costs  
13 of participating in proceedings such as this,  
14 at least the past costs, were not included in  
15 these five line items, but they were "in  
16 addition to"?

17 A Again, I'm not sure; that could be  
18 in that line item; it could not. Again, Ms.  
19 Kessler will know that answer.

20 Q Okay, but it is your  
21 understanding, though, that SoundExchange  
22 deducts 20 percent of royalties, as this

1 sentence seems to suggest, every year?

2 A We deduct 20 percent from only  
3 webcasting and PES, which were the subject of  
4 these proceedings. The admin fee or what's  
5 deducted on satellite radio is very much lower  
6 because there haven't been any expenses  
7 incurred.

8 What happened was the  
9 SoundExchange Board, when we were spun off as  
10 an independent non-profit, there was an  
11 agreement made between the artist side of the  
12 Board and the label side of the Board how we  
13 would handle the repayment of certain expenses  
14 that had been incurred prior to our becoming  
15 independent. That's, essentially, no one  
16 wanted the admin fee to be higher than 20  
17 percent. There are many collectives around  
18 the world where 20 percent is sort of a  
19 benchmark.

20 More mature collecting societies  
21 get down to 15. You can even see ASCAP and  
22 BMI, BMI is now 66 this year; ASCAP's 92.

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1 They are both around 15 percent, actually a  
2 little higher, depending on how you calculate  
3 the admin fee.

4 So, for us, and collecting a  
5 tenth, well, less than a tenth of the money,  
6 you know -- so we've been very efficient  
7 compared to other societies around the world.  
8 We felt 20 percent, my Board felt that 20  
9 percent was the right benchmark. Whatever we  
10 could shave below that would be what we would  
11 use to repay.

12 So if we're at 20 percent, we pay  
13 nothing back. If we're below 20 percent, we  
14 repay the difference.

15 Q Now you mentioned the agreement  
16 when SoundExchange was spun off to repay the  
17 recording industry its costs under the  
18 promissory note referred to in this annual  
19 report. How much was the note for?

20 A It was for \$9 million.

21 Q Do you know how much has been  
22 repaid so far, roughly?

1           A     I believe there's about \$2.5  
2 million left to be repaid.

3           Q     Again, just more for my benefit,  
4 this sentence talks about the repayment of  
5 costs incurred in the initial arbitrations.  
6 Those initial arbitrations it's referring I  
7 think you said were the pre-existing  
8 subscription services, and would that also  
9 include --

10          A     And Webcaster I.

11          Q     Webcaster I. What about Webcaster  
12 II?

13          A     No, I believe at that point we  
14 were paying for them out of actual revenue  
15 coming in.

16          Q     Okay. Would the same be true for  
17 I think what you've called the "Terms CARP,"  
18 which would be the --

19          A     Again, yes, that was something  
20 that we would have paid for out of --

21          Q     Just for the record, could you  
22 explain what the Terms CARP is, when I use

1 that -- well, when I see that term in  
2 SoundExchange documents?

3 A You're talking about Webcaster II  
4 where essentially it was just over terms, not  
5 over rates, because the rate was pushed  
6 forward, but there was an objection by RLI.  
7 So we went into a Terms CARP.

8 Q Okay.

9 A Which they then abandoned.

10 Q So I believe you also said then --  
11 so those two proceedings are still being paid  
12 for today, the one that occurred, the pre-  
13 existing subscription services proceeding that  
14 occurred in '98, I believe, and Webcaster I?  
15 There's still between \$2 and \$3 million left  
16 to be repaid, right?

17 A That's correct.

18 Q Okay. But the proceedings since  
19 then have been paid, I believe you said, on an  
20 amortized basis over the term of the  
21 license --

22 A Correct.

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1 Q -- that the proceeding covers?

2 A Correct.

3 Q Okay.

4 MS. ABLIN: Your Honor, I would  
5 like to move this exhibit which was 89 into  
6 evidence.

7 CHIEF JUDGE SLEDGE: Any objection  
8 to Exhibit 89?

9 MR. SMITH: No, Your Honor.

10 CHIEF JUDGE SLEDGE: Without  
11 objection, Exhibit 89 is admitted.

12 [Whereupon, the document  
13 marked as Services  
14 Exhibit 89 for  
15 identification was  
16 received in evidence.]

17 BY MS. ABLIN:

18 Q Just so we can have the full  
19 picture, I'm about to hand you, Mr. Simson, a  
20 document that we've marked as Services Exhibit  
21 90. It's another annual report by  
22 SoundExchange for the subsequent period to the

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1 one you just have been looking at, April 1st  
2 through December 31st, 2004. Just for the  
3 record, this document has been Bates numbered  
4 SX007661 through 65

5 [Whereupon, the document  
6 was marked as Services  
7 Exhibit 90 for  
8 identification.]

9 Q Mr. Simson, do you recognize this  
10 document?

11 A I do.

12 Q Did you assist in creating this  
13 annual report as well?

14 A I did.

15 Q If you could turn to page SX7665,  
16 and we won't dwell on this since we mostly  
17 covered it in the last one, but these expenses  
18 with the SoundExchange expenses listed at the  
19 top of that page were generally the same type  
20 of expenses you just described when we were  
21 going through them in the prior annual report?

22 A Correct.

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1 Q And the note --

2 JUDGE WISNIEWSKI: Can I interrupt  
3 just for a second here, just for a point of  
4 clarification?

5 Did the fiscal year change?

6 THE WITNESS: It did, Your Honor.

7 JUDGE WISNIEWSKI: Thank you.

8 THE WITNESS: When we were spun  
9 off, the RIAA was on a April 1-March 31.  
10 Since all of our licensees were on a calendar  
11 year, it made much more sense for us to be on  
12 a calendar year. So the Board voted to have  
13 a nine-month, a short year, and then we've  
14 been on a calendar year since.

15 JUDGE WISNIEWSKI: Thank you.

16 BY MS. ABLIN:

17 Q And just two more quick notes  
18 about this document. If you could look at the  
19 second-to-last full paragraph in the  
20 administrative rate section, also on page  
21 7665, just the last clause there, it says,  
22 "For the period April through December of

1 2004, SoundExchange repaid \$575,097 in  
2 principal and interest to the RIAA."

3 So this number, \$575,000, was the  
4 amount of the expenses we've just been talking  
5 about that was repaid for the prior CARP  
6 proceedings?

7 A Correct, because the admin fee was  
8 15 percent that year of actual operation. So  
9 we were able to repay the 5 percent  
10 difference.

11 Q To make up the 20 percent of  
12 administrative expenses that were then  
13 deducted?

14 A Right. There was a 5 percent  
15 differential.

16 MS. ABLIN: Your Honor, I'd like  
17 to move Services Exhibit 90 into evidence.

18 CHIEF JUDGE SLEDGE: Any objection  
19 to Exhibit 90?

20 MR. SMITH: No, Your Honor.

21 CHIEF JUDGE SLEDGE: Without  
22 objection, Exhibit 90 is admitted.

1 [Whereupon, the document  
2 marked as Services  
3 Exhibit 90 for  
4 identification was  
5 received in evidence.]

6 MS. ABLIN: Your Honor, I'm about  
7 to ask this witness a few questions about an  
8 exhibit that we received from SoundExchange  
9 that's been marked as restricted. I just  
10 wanted to pause a minute to allow  
11 SoundExchange the opportunity to move to close  
12 the session, if it so chose.

13 It's a one-page document with the  
14 SoundExchange logo on it entitled, "CARP  
15 Repayment." It lists some various  
16 expenditures and deductions of administrative  
17 rates that SoundExchange charged for various  
18 types of proceedings.

19 CHIEF JUDGE SLEDGE: And it refers  
20 to repayments of what?

21 MS. ABLIN: CARP, the document is  
22 entitled, "CARP Repayment," and it refers, I

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1 believe -- we can find out more from this  
2 witness -- to expenses that were incurred in  
3 participating in prior CARP proceedings to set  
4 the copyright rates that we're here before you  
5 now about over the years.

6 CHIEF JUDGE SLEDGE: Any objection  
7 to the motion -- oh, I'm sorry, there is no  
8 motion.

9 MS. ABLIN: I have just paused.

10 CHIEF JUDGE SLEDGE: All right,  
11 Mr. Smith?

12 MR. SMITH: Your Honor, I would  
13 exercise my opportunity to make a motion if I  
14 first could see the document for a moment.

15 MS. ABLIN: Absolutely.

16 MR. SMITH: I would move, Your  
17 Honor. It's a restricted document with  
18 internal finances in it. Discussion and the  
19 document itself were admitted, both subject to  
20 the protective order.

21 CHIEF JUDGE SLEDGE: It's internal  
22 financial information on what?

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1 MR. SMITH: CARP Repayments, which  
2 is to say expenses that were allocated toward,  
3 monies that were allocated toward prior CARP  
4 expenses. That's my understanding. The  
5 witness can explain it, I guess. I have never  
6 seen the document before myself, but that's  
7 what it looks like.

8 CHIEF JUDGE SLEDGE: Any objection  
9 to the motion for the application of the  
10 protective order on questions relating to an  
11 exhibit entitled, "CARP Repayments," involving  
12 expenses that have been incurred by  
13 SoundExchange in prior proceedings?

14 MR. STEINTHAL: No, Your Honor.

15 CHIEF JUDGE SLEDGE: Without  
16 objection, the motion is granted.

17 (Whereupon, the proceedings went  
18 into Closed Session.)  
19  
20  
21  
22

1 BY MS. ABLIN:

2 Q Mr. Simson, it's true, isn't it,  
3 that by far the biggest hurdle that  
4 SoundExchange has faced is finding the artists  
5 who are owed royalties?

6 A No question. In fact, that report  
7 was compiled to show the Board how hard it  
8 was. We actually had talked to other  
9 societies who said it had taken them 10 years  
10 to get to 90 percent payout.

11 As I think I may have mentioned,  
12 we pay 1500 right now independent labels and  
13 four majors. That's 90 percent. The last 10  
14 percent may be 6,000 individual copyright  
15 owners. It's the long tail who are harder to  
16 find.

17 With artists, there's no one  
18 artist who has even 1 percent of the  
19 royalties. So paying 12,000 artists --  
20 there's 50,000 artists that you may be  
21 searching for. As I said, we're a bigger  
22 company than some of these societies that took

1 10 years to get to 90. So it is our biggest  
2 challenge.

3 Q But I guess it's also true, isn't  
4 it, that sometimes SoundExchange has found  
5 artists and mailed checks to them, and they've  
6 received those checks returned back to them  
7 uncashed?

8 A I'm not aware -- I know there have  
9 been a couple of times when we've had to  
10 replace checks. I'm not that familiar with  
11 checks that have been returned. There may  
12 have been. We had one person who was worried  
13 they were going to lose their benefits who  
14 called us and said they were going to lose  
15 some federal benefits if they accepted the  
16 money, an older artist, but I'm not aware of  
17 any specific instances.

18 Q I'm now going to hand the witness  
19 a document that's been marked as Services  
20 Exhibit 93, which is an Associated Press  
21 article dated April 17th, 2005 and Bates  
22 numbered SX76300-302.

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1 [Whereupon, the document  
2 was marked as Services  
3 Exhibit 93 for  
4 identification.]

5 Q I will first represent to you, Mr.  
6 Simson, that this is a document that was  
7 produced to us by SoundExchange, and it came  
8 from something called the SoundExchange  
9 clipping file. Are you familiar with the  
10 SoundExchange clipping file?

11 A Yes. These are just press  
12 articles that we have been sent about us and  
13 our efforts.

14 Q Okay. Having seen this article  
15 now, are you generally familiar with it?

16 A Yes. No, in the first year or two  
17 of SoundExchange people didn't know who we  
18 were. So I think there was a major learning  
19 curve to get people to understand what these  
20 rights were. So we did have people who didn't  
21 cash the check initially, but we have re-  
22 issued most of those checks at this point.

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1 A lot of times we'll say, "We have  
2 money for you," and, of course, the first  
3 thing they want to know is, well, what do I  
4 have to do? I mean they think it's some sort  
5 of an internet scheme, kind of like the Kenyan  
6 oil companies or whoever, people who have  
7 millions of dollars for you.

8 So we have had to overcome that.  
9 I think it takes time. It just takes people  
10 understanding what their rights are and that  
11 this is a new revenue stream.

12 I was surprised, frankly, how long  
13 it's taken, but we've certainly started to get  
14 to a point where people are recognizing this.

15 MS. ABLIN: Your Honor, I would  
16 like to move Exhibit 93 into evidence.

17 CHIEF JUDGE SLEDGE: To support  
18 what he's just said? Never mind.

19 Any objection to Exhibit 93?

20 MR. SMITH: Yes, Your Honor. It  
21 was just used to refresh his recollection  
22 which he's just testified to. I don't know

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1 why we would want to admit newspaper clippings  
2 that are used for refreshing a recollection.

3 CHIEF JUDGE SLEDGE: Ms. Ablin?

4 MS. ABLIN: Well, Your Honor, it  
5 was used -- it's a document that came from a  
6 file that we received from SoundExchange, a  
7 clippings file, that he testified he was  
8 familiar with. He testified further that he  
9 was specifically familiar with this article,  
10 and I was using it to examine and test the  
11 truth of the statement that he made initially  
12 about whether artists had or had not returned  
13 checks uncashed.

14 So I would offer that it is an  
15 appropriate exhibit to admit into evidence as  
16 impeachment.

17 CHIEF JUDGE SLEDGE: Impeachment?  
18 What does it impeach?

19 MS. ABLIN: Well, the initial  
20 testimony, that he's now changed his testimony  
21 and explained it.

22 CHIEF JUDGE SLEDGE: Exhibit 93 is

1 admitted.

2 [Whereupon, the document  
3 marked as Services  
4 Exhibit 93 for  
5 identification was  
6 received in evidence.]

7 BY MS. ABLIN:

8 Q It's true, is it not, that some  
9 artists view the SoundExchange royalties as  
10 free money? Have you ever heard that term  
11 used by some artists?

12 A Free money?

13 Q Free money.

14 A I hear it more mailbox money, but  
15 I'm not sure if I've heard that. You know,  
16 someone may have said that.

17 Q Okay. Well, then I'd like to show  
18 you another exhibit that will, I guess,  
19 refresh your recollection on that.

20 [Whereupon, the document  
21 was marked as Services  
22 Exhibit 94 for

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identification.]

1  
2 Q I'm handing you the document that  
3 has been marked as Services Exhibit 94, which  
4 is another article that we've received as part  
5 of the SoundExchange clipping files. It's  
6 Bates numbered SX76331.

7 According to the note that was on  
8 here on the copy we received, it was an  
9 article written in the CMA "Close Up" magazine  
10 October through November of 2005.

11 A That's correct.

12 Q Do you recall this article, coming  
13 across this article?

14 A I remember doing this interview,  
15 yes.

16 Q If you could just look at the last  
17 paragraph again, just to refresh your  
18 testimony here. You at least ran into someone  
19 that got a check from you that described it as  
20 "free money."

21 A Yes.

22 MR. SMITH: Objection, Your Honor.

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1 What is the relevance of whether one artist  
2 used that particular expression? What are we  
3 doing with this line of questioning?

4 MS. ABLIN: Your Honor,  
5 SoundExchange has put in lots of testimony  
6 through many witnesses, including Mr. Simson,  
7 about the performing artists and how crucial  
8 this money, allegedly how crucial this revenue  
9 stream is to them. I believe that a statement  
10 from artists that it's just free money  
11 undermines the veracity of that statement at  
12 least as to some artists. Free money is not  
13 the same as a necessary and vital revenue  
14 stream that artists depend upon.

15 CHIEF JUDGE SLEDGE: The objection  
16 is overruled. The exhibit is admitted.

17 [Whereupon, the document  
18 marked as Services  
19 Exhibit 94 for  
20 identification was  
21 received in evidence.]

22 BY MS. ABLIN:

1 Q Mr. Simson, in addition to free  
2 money, would found money be a way that you've  
3 described this type of money?

4 A I am sure someone may have  
5 characterized it that way. They do the same  
6 with ASCAP and BMI royalties that show up in  
7 their mailbox.

8 Q Okay. We are now going to mark  
9 another exhibit, which we're up to Services  
10 Exhibit 95. We're switching gears now, going  
11 onto something else.

12 [Whereupon, the document  
13 was marked as Services  
14 Exhibit 95 for  
15 identification.]

16 Q I'm handing you a copy of a press  
17 release with the comment that you made. It's  
18 dated November 15th, 2002. It's been marked  
19 as Services Exhibit 95.

20 Do you see the second paragraph in  
21 this exhibit, the second sentence -- well,  
22 first of all, do you remember issuing this

1 press release or reviewing this press release?

2 A I do.

3 Q Could you describe the release for  
4 us?

5 A This was a release that was put  
6 out after the passage of the small webcaster  
7 bill. It was a compromise, obviously,  
8 reached. I think I made some comment about it  
9 earlier.

10 Q If you could look at the second  
11 paragraph on the exhibit, the second sentence  
12 says, "This provides all parties time to  
13 address the unique circumstances of non-  
14 commercial webcasters and reach an appropriate  
15 arrangement." Which unique circumstances were  
16 you referring to?

17 A Well, I think if you think about  
18 willing buyer/willing seller standard, a  
19 performance on a for-profit or a non-profit  
20 would be identical for a user. I mean it's  
21 using our music. So, absent some other  
22 reason, they should be valued the same. But

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1 when you look at a non-commercial service, and  
2 perhaps its educational mission or its  
3 religious mission, there may be a policy  
4 reason why we would treat them differently.

5 I don't think you would on an  
6 economics -- I'm not the economist, but I  
7 don't think you would value them differently.  
8 But there may be a policy reason why you would  
9 treat a small non-commercial service different  
10 than a large service. That's what I was  
11 referring to here.

12 Whether it's college, whether it's  
13 NPR, you know, it was recognizing they're  
14 different from a policy standpoint, but not in  
15 the marketplace difference.

16 Q It's also true, in addition to  
17 being non-profits and having purposes like a  
18 religious purpose or an educational purpose,  
19 they can't sell advertising, right, because  
20 they're non-commercial?

21 A I would say that's probably true  
22 for them. Some have pretty snazzy-looking --

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1 Q What about --

2 A Maybe they're not called  
3 commercials though.

4 Q Yes, let me limit that question a  
5 little bit. What about non-commercial radio  
6 stations operating under a non-commercial FCC  
7 license that are simulcasting?

8 A You know, I recognize from a  
9 policy perspective they are different.

10 Q One of the differences is they  
11 cannot sell advertising?

12 A Correct.

13 JUDGE ROBERTS: Mr. Simson, when  
14 you're saying from a policy reason, whose  
15 policy are you referring to? The policy of  
16 the recording industry?

17 THE WITNESS: No, I think it would  
18 be public policy. So, for example, Congress  
19 has at times said we're going to treat public  
20 broadcasting differently than we treat  
21 commercial broadcasting. I think this  
22 particular bill was Congress saying we want

1 something done here. So it was a policy  
2 issue. It wasn't a willing buyer/willing  
3 seller negotiation in a marketplace.

4 JUDGE ROBERTS: But it's not  
5 policy from the record industry side?

6 THE WITNESS: No.

7 BY MS. ABLIN:

8 Q Are you familiar with the  
9 testimony that Sound -- I assume you are;  
10 you're the Executive Director of  
11 SoundExchange. Your company submitted  
12 testimony through many witnesses talking  
13 about, arguing that they need census reporting  
14 as opposed to sample reporting on the music  
15 use reports.

16 A I'm certainly aware of that issue.

17 Q I'm now going to hand you an  
18 exhibit. It's been marked as Services Exhibit  
19 96.

20 This was produced to us by  
21 SoundExchange in discovery. It's a  
22 SoundExchange Newsletter. It's Bates numbered

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1 SF76095 to 102.

2 [Whereupon, the document  
3 was marked as Services  
4 Exhibit 96 for  
5 identification.]

6 Q Do you have any involvement, Mr.  
7 Simson, in publishing these newsletters and  
8 making them available to interested persons?

9 A I do.

10 Q And are they made available on  
11 SoundExchange's website?

12 A They are made available on our  
13 website.

14 Q If you look at the first page of  
15 this exhibit, 76095, it says there, "Letter  
16 from the Executive Director"?

17 A That's correct.

18 Q And I take it that's you?

19 A That is me.

20 Q Below that, it starts out, "Dear  
21 SoundExchange Members and Friends," and this  
22 is the text of a letter that you wrote to

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1 SoundExchange members and friends, correct?

2 A Correct.

3 Q If you could flip to page 76097,  
4 and in the third full paragraph, you're  
5 talking about -- it starts by saying,  
6 "SoundExchange now has a competitor for the  
7 collection and distribution of royalties." I  
8 take it that you're referring to Royalty  
9 Logic?

10 A Correct.

11 Q And if you go down about partway  
12 through this paragraph, you're making an  
13 argument in here about why census data should  
14 be required, correct?

15 A Correct.

16 Q It says here, "Our preliminary  
17 analysis indicates that webcasting is  
18 completely different from radio, presenting a  
19 far greater variety of music, much of it not  
20 repeated with any regularity."

21 Then skipping on to the end of the  
22 paragraph, it says, "SoundExchange does not

1 oppose sampling per se since in some instances  
2 it may be desirable. Certainly one must  
3 balance the cost of processing data versus the  
4 amount received from a licensee."

5 Then the last sentence says, "It  
6 may be perfectly suited to FM radio where  
7 playlists are short, extremely homogenized,  
8 and the loss of data in sample is minimal."  
9 Do you see that?

10 A I do see that.

11 Q These were your words --

12 A That's correct.

13 Q -- in the letter? So in this  
14 passage you were making a distinction between  
15 the type of programming that's broadcast on  
16 terrestrial radio versus perhaps other types  
17 of internet-originated services and the  
18 diversity in that programming?

19 A That's correct.

20 MS. ABLIN: Your Honor, I'd like  
21 to move Exhibit 96 into evidence.

22 CHIEF JUDGE SLEDGE: Any objection

1 to Exhibit 96?

2 MR. SMITH: No, Your Honor.

3 CHIEF JUDGE SLEDGE: Without  
4 objection, it's admitted.

5 [Whereupon, the document  
6 marked as Services  
7 Exhibit 96 for  
8 identification was  
9 received in evidence.]

10 BY MS. ABLIN:

11 Q Mr. Simson, on this exhibit just  
12 for one more minute here, if the same FM radio  
13 station -- you know, you testified earlier  
14 that a radio simulcaster simulcasts the  
15 identical programming to that which is over  
16 the air minus a few ads. That programming  
17 would have these same characteristics that you  
18 listed in this letter, would it not? For  
19 example, it would have short playlists in the  
20 same manner that FM radio has short playlists?

21 A Well, actually, we're moving out  
22 of that with this new Jack format and some

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1 other formats that radio broadcasters are  
2 using to try to compete with satellite radio.  
3 So that may have been true three years ago  
4 when this was written, but we're seeing a very  
5 seismic shift, I think, in radio programming  
6 right now.

7 So I'm not sure it would be as  
8 correct -- it would be probably for certain  
9 formats because there are some formats that  
10 are very tightly playlisted, the same 30 songs  
11 over and over again. But there are now some  
12 formats like Mix107 in D.C. which used to be  
13 the same 30 songs; it's now, they say it's  
14 like playing your iPod. So it's 100, 800,  
15 1,000. It's a lot of songs.

16 Q By and large, as compared to other  
17 types of more niche-oriented services, though,  
18 terrestrial radio is more homogenized?

19 A That's true, yes. I mean --

20 Q On a relative scale, their  
21 playlists are more hit-oriented, correct?

22 A That is correct. Radio is

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1 definitely different than webcasting.

2 Q Okay. You're also aware that  
3 SoundExchange has asked licensees in the  
4 separate recordkeeping proceeding that has  
5 gone on to report a number of different types  
6 of data elements when they submit music use  
7 reports?

8 A Yes.

9 Q And you're also aware, though,  
10 that those webcasters, particularly radio  
11 broadcasters, often receive sound recordings  
12 from labels with no information except perhaps  
13 the title and the artist of the recordings?

14 A I mean we've certainly heard from  
15 the broadcasters that there are some  
16 promotional CDs before release that they may  
17 get that may only have certain data elements  
18 on them, but, typically, they will then get  
19 the full CD that has all of the elements at  
20 some point after that.

21 Q Would you agree that one of the  
22 most compelling arguments that was made in the



1 separate recordkeeping proceeding was, in  
2 fact, that certain webcasters got product with  
3 often no identifying information on it and  
4 that they backed it up with several examples?

5 A No, I actually don't agree.

6 Q Okay. I'm now showing you a  
7 document that's been marked as Services  
8 Exhibit 97. It's another issue of the  
9 SoundExchange Newsletter. It's Bates numbered  
10 SX76024 through 38.

11 [Whereupon, the document  
12 was marked as Services  
13 Exhibit 97 for  
14 identification.]

15 Q Do you recognize this document as,  
16 in fact, a copy of a SoundExchange  
17 Newsletter --

18 A I do.

19 Q -- that your organization has put  
20 out? And if you could turn to page SX76025?

21 A Yes.

22 Q At the top there it says, "Dear

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1 SoundExchange Members and Friends." Is this  
2 another letter that you wrote?

3 A It is.

4 Q If you could just look down at the  
5 last part of that first paragraph --

6 A I see -- I see that --

7 Q -- you did say that at the --

8 A In that proceeding, broadcasters  
9 made arguments that there were times when they  
10 were getting this. I wouldn't say all the  
11 time. So we were making the point to our  
12 members: Make sure that the product you send  
13 out is identifiable.

14 Q And that was, in fact, at least at  
15 the time in that proceeding, one of the most  
16 compelling arguments that you confronted?

17 A Certainly when someone says,  
18 "We're only getting it with this," we  
19 listened, and we wanted to make sure that, in  
20 fact, we were getting product that had more  
21 identification on it and warning our members  
22 that, if they didn't provide that information,

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1 they might not get paid.

2 Q And you would agree that copyright  
3 owners, at least from this point, needed to do  
4 a better job of providing that information?

5 A Some.

6 Q Some. Now you're aware, are you  
7 not, that issues like sample versus census and  
8 the data elements, they've been the subject of  
9 a separate rulemaking, correct? They're not  
10 subject to this particular proceeding, right?

11 A I know there was a separate  
12 proceeding.

13 Q Right, and they're not the subject  
14 of this proceeding?

15 A That's correct.

16 Q Now I believe you testified in  
17 your written direct statement that, quote,  
18 "There are literally hundreds of webcasters  
19 who take advantage of the statutory  
20 licenses."? We can look at it, too.

21 A Yes, but I'm sure that's right.

22 Q Okay. I'd like to talk for a few

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1 minutes about that statement.

2 MS. ABLIN: Your Honor, I'm about  
3 to show the witness just an exhibit, again,  
4 that's been marked as restricted by  
5 SoundExchange. Again, I wanted to pause to  
6 allow -- I will hand them a copy of the  
7 exhibit and allow them the opportunity to  
8 object, or I'm sorry, to move that we go into  
9 closed session.

10 It was a document that was  
11 produced to us by SoundExchange to support an  
12 assertion that Mr. Simson made in his  
13 statement, and it relates to the number of  
14 services that were paying royalties and the  
15 amounts that they paid for the year 2004.

16 MR. SMITH: I would move that this  
17 be treated as a restricted document and  
18 discussion of it also be treated as  
19 restricted, Your Honor.

20 CHIEF JUDGE SLEDGE: I don't have  
21 any specifics, Mr. Smith, on which to --

22 MR. SMITH: Well, it's really her

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1 obligation to make the motion. She signed the  
2 protective order.

3 CHIEF JUDGE SLEDGE: Well, she's  
4 not made a motion. You're making the motion.

5 MR. SMITH: It's kind of a  
6 difficult way to proceed to hand me a document  
7 and say, "How would you like to make a motion  
8 about this?" It seems to be a list of  
9 webcasters with dollars and percentages next  
10 to them. What she has just said were how much  
11 they paid and what percentage they paid to  
12 SoundExchange. If that's the case, it  
13 certainly ought to be restricted. There's  
14 about 500 webcasters on here with dollars and  
15 percentage next to them.

16 CHIEF JUDGE SLEDGE: Payments by  
17 webcasters by whom?

18 MR. SMITH: Your Honor, I  
19 understood Ms. Ablin to say it's to  
20 SoundExchange.

21 MS. ABLIN: Your Honor, if it will  
22 help matters, I also have a copy of

1 SoundExchange's production index that lists  
2 these Bates numbers, and it tells us which  
3 document request it was responsive to. It may  
4 assist Mr. Smith in formulating his motion, if  
5 he'd like to see it.

6 CHIEF JUDGE SLEDGE: I don't know  
7 if it would or not.

8 MS. ABLIN: Oh, okay.

9 MR. SMITH: It is a document that  
10 reflects payments by the webcasters of  
11 royalties on the licenses. So it's very  
12 specific. It's restricted. It ought to be  
13 restricted.

14 CHIEF JUDGE SLEDGE: For what  
15 period of time?

16 MR. SMITH: It appears to be for  
17 2004, Your Honor.

18 CHIEF JUDGE SLEDGE: Any objection  
19 to the motion to apply the protective order  
20 for the exhibit and testimony on payments by  
21 the webcasters to SoundExchange on royalties  
22 in the year 2004?

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(No response.)

Without objection, the motion is  
granted.

(Whereupon, the proceedings went  
into Closed Session.)

1 MS. ABLIN: I can ask the question  
2 again.

3 BY MS. ABLIN:

4 Q You were the chief executive of  
5 SoundExchange and responsible for the  
6 organization's overall strategy?

7 A I'm responsible for a lot of the  
8 direction as the Executive Director.  
9 Obviously, there are a lot of other inputs.

10 Q Again, on risk of stating the  
11 obvious, the testimony that you're giving  
12 today and a couple of weeks ago is as a party  
13 to the proceeding that you are the Executive  
14 Director for, and so your views express the  
15 views of one particular party to the  
16 proceeding?

17 A That's correct.

18 MS. ABLIN: I have no further  
19 questions.

20 CHIEF JUDGE SLEDGE: Ms. Brown,  
21 any questions?

22 MS. BROWN: Just a few questions.



1 CHIEF JUDGE SLEDGE: All right.

2 CROSS EXAMINATION

3 BY MS. BROWN:

4 Q Good afternoon, Mr. Simson.

5 A Good afternoon.

6 Q I think you mentioned in your  
7 testimony and in response to questions from  
8 Ms. Ablin, that small commercial webcasters  
9 and non-commercial webcasters petitioned  
10 Congress to ask for a reduction in rates after  
11 the last rate-setting proceeding, what you  
12 refer to as Webcasters I, correct?

13 A Well, specifically, we were  
14 talking about non-commercial webcasters, but  
15 you're correct that small commercial  
16 webcasters were part of that as well.

17 Q But isn't it true that the RIAA  
18 entered into a voluntary agreement with NPR  
19 prior to passage of the Small Webcasters  
20 Settlement Act?

21 A That is correct. They entered  
22 into a voluntary agreement while Webcaster I

1 was going on.

2 Q And the rates that were the  
3 subject of that voluntary agreement were  
4 different than the statutory rate that was  
5 set, correct?

6 A That is correct. That is correct.

7 Q I think you also mentioned during  
8 your testimony on direct that you worked for  
9 a time at the Corporation for Public  
10 Broadcasting, isn't that right?

11 A I did.

12 Q Okay. When was that?

13 A 1986.

14 Q How long were you there?

15 A About 11 months.

16 Q Well, I'll ask you a few questions  
17 and we'll see if it tests your knowledge after  
18 11 months there.

19 A I probably don't remember  
20 anything, but it's okay.

21 Q Well, I'm sure you're aware that  
22 the Corporation for Public Broadcasting is a

1 federal agency that is subject to  
2 congressional appropriations?

3 A Yes, I'm very aware of that.

4 Q Okay. And that it's also,  
5 obviously, subject to budget cuts and  
6 rescissions?

7 A That seems to be an annual issue.

8 Q And you're aware then, aren't you,  
9 that NPR and its member stations obtained  
10 funding through Corporation for Public  
11 Broadcasting, right?

12 A I know they have received some  
13 percentage of their funding.

14 Q Okay. During your time at the  
15 Corporation for Public Broadcasting were you  
16 aware that NPR, because of a budget crisis,  
17 almost shut its operations?

18 A I think I do remember that  
19 occurring.

20 MS. BROWN: I think those are all  
21 the questions, Your Honor.

22 Thank you.

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1 THE WITNESS: Sure. You're  
2 welcome.

3 CHIEF JUDGE SLEDGE: Mr. Malone,  
4 any questions?

5 MR. MALONE: Yes, please, Your  
6 Honor.

7 CROSS EXAMINATION

8 BY MR. MALONE:

9 Q Good afternoon, Mr. Simson.

10 A Good afternoon.

11 Q Bill Malone, and I represent the  
12 Intercollegiate Broadcasting System and WHRB.  
13 As a matter of fact, you've had some  
14 acquaintance with the Intercollegiate  
15 Broadcasting System?

16 A I have.

17 Q What does that consist of?

18 A I am almost, I guess, an annual  
19 guest at your annual convention and speak on  
20 the webcasting panels.

21 Q And to whom are you speaking at  
22 these conventions?

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1 A It's usually college radio  
2 personnel and the faculty advisors.

3 Q By "personnel," you mean students?

4 A Students, yes.

5 Q All right. You've talked this  
6 afternoon and also on May the 5th, I think it  
7 was, about some of the other outside work you  
8 do, and you meet with artists at places such  
9 as Wildwood?

10 A That's correct.

11 Q What is the thrust of your message  
12 to these artists?

13 A Well, it's, obviously, an  
14 educational campaign that we have been  
15 launching to make them aware of their rights,  
16 to let them know that their work is still  
17 being used for a lot of these older legacy  
18 artists, and to get them signed up.

19 It's always very welcome. When we  
20 go there and they find out that they have  
21 royalties, they're very excited about this.

22 Q What do you mean by "getting them

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1 signed up"?

2 A Well, in order for us to make  
3 payments without withholding 30 percent and  
4 sending it to the IRS, we need to have a W-9  
5 on file. We also need to have an address,  
6 where to pay them.

7 So, typically, we have a couple of  
8 forms that artists fill out that enables us to  
9 pay them. There's one additional form an  
10 artist can fill out which would enable us to  
11 collect royalties for them from overseas.

12 Q Do you require such a form for  
13 domestic royalties?

14 A Well, there's just two forms that  
15 one has to sign to get domestic royalties.  
16 Well, actually, if we have an address, we'll  
17 send you your royalties, but we'll have to  
18 withhold 30 percent under IRS regulations. So  
19 there's two. We need an address and we need  
20 a W-9.

21 Q When you were here before, you  
22 spoke, and your testimony, of course, speaks

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1 at some length, about Royalty Logic. Is it  
2 correct that these artists to whom you speak  
3 do have the option of signing up with Royalty  
4 Logic in lieu of SoundExchange?

5 A I would imagine they have an  
6 option to do that or they can also direct  
7 license, if they wish.

8 Q Is part of your responsibility,  
9 then, convincing the artists that they should  
10 take their monies through SoundExchange as  
11 opposed to Royalty Logic?

12 A Sure.

13 Q All right. I want to show you, if  
14 I may, Mr. Simson, what is Services Exhibit  
15 99. This is Bates stamped SX0076011 through  
16 SX0076023.

17 [Whereupon, the document  
18 was marked as Services  
19 Exhibit 99 for  
20 identification.]

21 Q Is this a document the original of  
22 which is reasonably familiar to you?

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1 A Yes, this looks like another  
2 SoundExchange Newsletter.

3 Q As a matter of fact, it has a  
4 letter from the Executive Director in it.

5 A That's correct.

6 Q And it even has your picture in  
7 it.

8 (Laughter.)

9 Can you date this Volume 3, Issue  
10 3?

11 A Well, since we reference spinoff,  
12 I would imagine this was right around the end  
13 of September of 2003.

14 Q At the risk of raising a perhaps  
15 painful issue, it also follows the death of  
16 your grade-school friend?

17 A That's correct.

18 Q And so that would put it how late  
19 now?

20 A Oh, so that's actually later. He  
21 died in November. So it was a little later in  
22 that year.

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1 Q Then, if you'll look at page 6021,  
2 there appears to be a future calendar with  
3 dates certainly as early as January 24, 2004.  
4 So can you infer whether this was issued  
5 before or after --

6 A No, this would have been at the  
7 end, toward the end of the year, and these  
8 would have been upcoming events that you're  
9 seeing.

10 Q All right. Now I'd like you to  
11 turn to pages -- to your letter as it appears  
12 on 76015 and 76016. I'm looking at the  
13 righthand column here in the first full  
14 paragraph about halfway down. I would like to  
15 ask you if you're speaking here about the same  
16 considerations that you discussed with Ms.  
17 Ablin and Ms. Brown. That is, the difficulty  
18 of compliance encountered by non-commercial,  
19 small or non-commercial services.

20 A I think you're referring to in the  
21 letter we talk about setting up a task force  
22 with non-commercial stations to try to help

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1       them.

2               Q       And the purpose of the task force  
3       that's being set up?

4               A       We were trying to come up with a  
5       technological solution to what college radio  
6       was saying to us was a problem they had  
7       reporting. As I've mentioned frequently at  
8       the IBS conventions, college radio typically  
9       plays a different mix of music, and I know the  
10      college kids who play that music would want  
11      the right artist to get paid.

12              SoundExchange, the reason we want  
13      reporting and census reporting is we want to  
14      make sure that we're making accurate payments.  
15      Always our goal is to make the most accurate  
16      payments possible, and that's why we set up  
17      the task force, to see if we could help  
18      smaller college, you know, non-commercial  
19      stations who didn't have any staff, or  
20      certainly paid staff, to come up with a way to  
21      report to us, so the right artist got paid.

22              Q       Can you give a little more meaning

1 to the phrase that you used, "technological  
2 solution"?

3 A Well, I think, again, there was a  
4 task force set up, and the idea was to see if  
5 we couldn't come up with a device that could  
6 be used to tell us exactly what was going over  
7 from the servers. There were obviously some  
8 issues between the college stations who didn't  
9 like some of the conditions, and so it never  
10 went forward.

11 Q By "it never went forward," that  
12 is the technological problem was not solved or  
13 --

14 A Again, Ms. Kessler was on that  
15 task force, so she can speak to it more  
16 precisely than I can, but my understanding was  
17 that there were certain pushbacks from the  
18 college stations, there were certain things  
19 they didn't want to allow, whether it was  
20 servers being monitored within their stations  
21 or to have these devices put on their  
22 networks.

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1 Q Is the task force inactive or --

2 A I think it's inactive at this  
3 point.

4 Q I see. But the college  
5 broadcasters are still paying the \$25-a-year  
6 surcharge for the task force?

7 A Well, the \$25 surcharge was in  
8 lieu of data to pay us for the work we would  
9 have to do to try to figure out who to pay,  
10 the extra burden on us.

11 Q Are there any college webcasters  
12 who provide the data in lieu of the \$25?

13 A Well, there are no -- well, I  
14 should say I really don't know the answer to  
15 that. I do know college webcasters who are  
16 capable of giving the data because they've  
17 told us that.

18 Q Is this a large number or a small  
19 number?

20 A It tends to be the larger  
21 university stations.

22 Q Turning now to 76016, and at this

1 point you're asking some, I guess, rhetorical  
2 questions in your letter. This is the  
3 paragraph which, without naming them, I take  
4 it, does it allude to Royalty Logic?

5 A It does.

6 Q So looking on 76016 at the top of  
7 the lefthand column, you ask the rhetorical  
8 question, why does this company -- that is, I  
9 take it, Royalty Logic -- and your answer is  
10 affirmative there?

11 A Yes.

12 Q "Why does this company favor  
13 sampling instead of census data that we are  
14 fighting for? What is the answer to the  
15 rhetorical question?

16 A Well, there was a Copyright Office  
17 roundtable in May of 2002. We had done,  
18 SoundExchange had actually conducted a survey.  
19 Well, we had taken -- someone who had actually  
20 designed ASCAP samples, and they took the  
21 ASCAP sample and put it over the many channels  
22 of one of the pre-existing services and showed

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1 us what would happen with an ASCAP sample  
2 where you only got three days every quarter.  
3 Forty-one percent, I believe -- it's been a  
4 while -- but a significant number of the  
5 titles and a significant number of the artists  
6 disappeared. I believe it was 41 percent of  
7 the titles, 28 percent of the artists,  
8 something along those lines. This was very  
9 disturbing to us.

10 On the other hand, Mr. Gertz and  
11 RLI testified, oh, sampling would be fine,  
12 having done no analysis of the data, just  
13 based on their experience with over-the-air  
14 radio and television, which is completely  
15 different than online music. It's just so  
16 much broader a repertoire.

17 That's why we did the survey, to  
18 quantify what the loss would be to primarily  
19 smaller independent labels and smaller  
20 independent artists.

21 Q The survey that you're referring  
22 to here using ASCAP-type sampling, what

1 program stream was sampled?

2 A It was one of the pre-existing  
3 services. I don't remember which particular  
4 one, actually, at this point.

5 Q But it was one single service?

6 A Of about 50 or 60 channels.

7 Q That is one webcaster with 50 or  
8 60 channels?

9 A One service with 50 or 60  
10 channels.

11 Q All right. It seems to me you  
12 just told us that the college stations'  
13 program mix differed materially from the run-  
14 of-the-mill radio station?

15 A Oh, that's correct.

16 Q So --

17 A For the most part.

18 Q So the sampling here was of a  
19 different type of webcasting operation than a  
20 simulcast of a non-commercial educational  
21 station?

22 A I'm not sure I follow.

1 Q Well, I'm trying to elicit from  
2 you how representative the one service you  
3 used was of small, non-commercial  
4 simulcasters.

5 A I think it's impossible to  
6 determine that.

7 Q Whether it was representative or  
8 not?

9 A Correct.

10 MR. MALONE: I think that  
11 concludes my questions.

12 CHIEF JUDGE SLEDGE: Mr.  
13 Freundlich, any questions?

14 MR. FREUNDLICH: Your Honor, I  
15 crossed Mr. Simson.

16 CHIEF JUDGE SLEDGE: You already  
17 have finished that? That's correct.

18 MR. FREUNDLICH: Right.

19 CHIEF JUDGE SLEDGE: Any other  
20 parties wishing to cross examine at this time  
21 who have not had the opportunity?

22 MR. MALONE: Excuse me, Your



1 Honor. I neglected to move the next, Services  
2 Exhibit 99. If Your Honor please, I neglected  
3 to move the admission of Services Exhibit 99.

4 CHIEF JUDGE SLEDGE: For what  
5 purpose?

6 MR. MALONE: To explain the  
7 testimony by the witness as to burden on the  
8 small, non-commercial webcasters to explain  
9 the motive for the SoundExchange insistence on  
10 census data collection.

11 CHIEF JUDGE SLEDGE: Any objection  
12 to Exhibit 99?

13 MR. SMITH: No, Your Honor.

14 CHIEF JUDGE SLEDGE: Without  
15 objection, Exhibit 99 is admitted.

16 MR. MALONE: Thank you, Your  
17 Honor.

18 [Whereupon, the document  
19 marked as Services  
20 Exhibit 99 for  
21 identification was  
22 received in evidence.]

1 CHIEF JUDGE SLEDGE: Mr. Smith, do  
2 you have any redirect?

3 MR. SMITH: Just a small amount,  
4 Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. SMITH:

7 Q Mr. Simson, I want to start with  
8 some topics that were raised by Mr. Freundlich  
9 almost two weeks ago and ask you, if you  
10 could, you testified that you didn't think it  
11 would work for SoundExchange to offer advances  
12 to some of the beneficiaries of the royalties  
13 because it was a compulsory license system.

14 A That's correct.

15 Q Can you explain the reasons for  
16 that?

17 A Sure. First of all, let me say  
18 that I know of no other collectives outside  
19 the United States that offer advances,  
20 because, essentially, if you are licensing at  
21 the statutory rate and you're allocating all  
22 of the money on an equal basis to all of those

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1 performances, then other than the fee you're  
2 taking out as your costs, we take our costs  
3 off the top, we allocate everything else to  
4 each copyright owner and artist based on  
5 what's been performed.

6 If we were to provide an advance,  
7 it would either be we would have to charge a  
8 higher admin fee to cover that cost, which  
9 would then come out of the royalties that  
10 we're paying out, or we would have to take it  
11 from some other performing -- meaning we're  
12 paying artificially low to a particular  
13 performer or record label. I think it's a  
14 very bad practice in a statutory licensing  
15 situation for a non-profit. I think what  
16 would happen is you would end up favoring the  
17 bigger performers and the bigger labels who  
18 are easier to pay, and you would  
19 disenfranchise the independent labels and the  
20 independent artists who have less leverage and  
21 will certainly command less.

22 Q What policies, if any, does

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1 SoundExchange have with regard to  
2 discrimination among the beneficiaries?

3 A We treat everyone equally and we  
4 value every performance equally. The only  
5 weighting that is potentially in the system  
6 comes from the per-play rate if, in fact,  
7 someone is paying on a per-performance rate.  
8 So if 10 people are listening to this song,  
9 they would get 10 times the royalty rate. If  
10 100 people listen to this song, they get 100  
11 times. So it's a pure system where you  
12 deserve the 10 weight or the 100 weight  
13 because that's how many were -- that's what  
14 the webcasters are paying on.

15 Q Okay. Now do you have a view  
16 about whether it would be workable in the real  
17 world for there to be two collectives like  
18 SoundExchange and ask the webcasters to figure  
19 out how much royalties they should pay to each  
20 of those two collectives?

21 A Well, I think, given the  
22 experience that we have had with just working

1 with other societies around the world, you're  
2 going to have conflicting claims; it's going  
3 to lead to more administrative burden and more  
4 cost.

5 I think it's clear -- I think I  
6 mentioned earlier that I think having multiple  
7 collectives on the musical work side has been  
8 a burden for licensees who have to get three  
9 licenses instead of one. You look at other  
10 countries where there's one musical work  
11 society; they have now merged typically with  
12 the mechanical society, so you can get a one-  
13 stop license. You can't do that in the United  
14 States.

15 You look at the duplication of  
16 effort. So, for example, I think I mentioned  
17 ASCAP and BMI each take \$100 million for the  
18 work they do on behalf of their constituents.  
19 If you had one organization, that's an  
20 additional \$50 million minimum going to music  
21 publishers and songwriters.

22 Q Okay. Now, hypothetically, if

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1 SoundExchange and RIAA were both designated  
2 agents to collect these royalties, do you have  
3 a view about which of those two entities ought  
4 to be designated as the ones who receive  
5 royalties for the artists who haven't yet  
6 affiliated with either one?

7 A Well, I think in the first CARP  
8 the ruling designating us was probably very  
9 compelling in the sense that all of the major  
10 artist groups, the American Federation of  
11 Television and Radio Artists, the Musicians  
12 Union, AF of M, the Recording Artists  
13 Coalition, an organization of some major  
14 recording artists, all felt that, because we  
15 were a non-profit, because our Board had, you  
16 know, artist representation on that Board,  
17 because we were a non-profit, and our goal was  
18 to pay as many people as we could and to pay  
19 as much as we could, that we were the proper  
20 organization to do non-members.

21 Q Now do you consider ASCAP, BMI,  
22 and SESAC as an apt analogy in trying to

1 decide whether there should be more than one  
2 collective on the sound recording side?

3 A I don't. I think it's a very  
4 different situation. So, for example, in a  
5 statutory license, one organization -- we have  
6 been the only organization that has been  
7 fighting for rates for copyright owners and  
8 sound -- copyright owners.

9 Once that rate is set, it's not  
10 like we can compete on someone on what rate we  
11 can get people. The rate is the rate. The  
12 only competition will be below that rate.

13 So if they're not operating on a  
14 statutory license, even though they have  
15 consent decrees and there are other  
16 constraints they may have, they can still  
17 offer their members many different ways of  
18 payment. They can have different rules about  
19 payment. They do have bonus systems where, if  
20 your song is played a million times, all of a  
21 sudden it's worth more.

22 We are under Copyright Office

1 regulation. So that if someone is unhappy  
2 with something we're doing, they can go to the  
3 Copyright Office. Certainly, they can go to  
4 my Board. As I have mentioned, these are the  
5 constituents who represent the vast majority  
6 of artists and sound recording copyrights in  
7 the United States.

8 Q Now could you refresh my  
9 recollection? Which are the two unions of  
10 artists that are represented on your Board?

11 A The American Federation of  
12 Musicians has one Board member. It's  
13 typically the President of the AFM although  
14 there is a designee. And the American Federal  
15 of Television and Radio Artists, AFTRA, who  
16 are pretty much the singers. So if you think  
17 about it, the AF of M is the musicians; AFTRA  
18 is typically the singers.

19 Q Have those two organizations, in  
20 your discussions at SoundExchange, taken a  
21 position about whether they think there ought  
22 to be more than one collective?

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1           A       They strongly believe there should  
2 be one collective and that it should be  
3 SoundExchange.

4           Q       Do you have a belief, though, Mr.  
5 Simson, about whether it's appropriate for  
6 SoundExchange to be deducting fees to lawyers  
7 litigating these rate proceedings before they  
8 pay out royalties?

9           A       Every other collecting society  
10 around the world does. I mean, otherwise, how  
11 would you pay for these proceedings unless you  
12 took them from the royalties.

13                   I mean another option, and I think  
14 this may have been what was originally  
15 anticipated years ago when the statutes were  
16 first passed, that the labels might bear these  
17 costs but then they would get all the  
18 royalties, recoup their money, and then pay  
19 out according to contract.

20                   We now have a system where 50  
21 percent of every dollar we collect after costs  
22 is distributed, and that was part of the

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1 arrangement to spin off SoundExchange, make it  
2 independent, and have it be controlled 50/50.

3 Q Who at SoundExchange controls what  
4 kinds of costs you do deduct from the royalty  
5 payments?

6 A Well, ultimately, it's the full  
7 Board of Directors, the 18 members. There is  
8 a smaller subcommittee of three artist members  
9 and three label members, but it's the full  
10 Board.

11 Q Now you were asked some questions  
12 this afternoon about delays in distribution of  
13 royalties that were reflected, I think it was  
14 in Services Exhibit 92, the Board meeting  
15 PowerPoint.

16 A Yes.

17 Q Can you tell us why it is that you  
18 have been more successful in paying off,  
19 paying royalties to the labels than to the  
20 artists, at least as reflected in that  
21 exhibit?

22 A Sure. I mean I think some of it

1 is just self-evident. Labels typically are  
2 businesses and they're easier to find, and  
3 there's fewer of them.

4 It's especially easy when you can  
5 write four checks and you pay 35 percent of  
6 the royalties in those four checks. As I  
7 mentioned, you can pay another 65 percent to  
8 about 1500 other independent labels, and we  
9 get the 90 percent pretty quickly.

10 On the artist side, and I will say  
11 one of the reasons this was given to the Board  
12 was to show them how hard it was and how much  
13 more we needed to do, and we went from 2,000  
14 artists at about the time, maybe just a little  
15 before this, to 12,000 artists in this last  
16 year and a half, or maybe it's from 3,000 to  
17 12,000, but it's been a dramatic increase as  
18 the word's gotten out.

19 We did hire a public relations  
20 firm and we did a bunch of advertising. We  
21 did newspaper articles. I was in The New York  
22 Times. We did CBS Evening News, NPR. We were

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1 in a lot of places trying to get the word out  
2 to these performers, and, again, just going to  
3 a lot of conferences.

4 Another way that we have been able  
5 to get larger percentages out is by signing  
6 agreements with organizations in other  
7 countries that represent large numbers of  
8 performers.

9 Q Can you tell me, if you know, what  
10 the percentages are of how much you've  
11 distributed to the artists and the labels as  
12 of today?

13 A Again, Ms. Kessler will have those  
14 numbers much more concretely than I will.  
15 What I remember is that we went from a 40  
16 percent payout to about a 60 to 65 percent  
17 payment for the artists in that one-year  
18 period. So we really turned, made a major  
19 quantum leap last year, increasing our payouts  
20 by 50 percent.

21 Again, it's a continuing issue,  
22 though. As you get more and more artists, you

1 know, when you have 40,000 records released in  
2 a year, roughly, it's a massive task to get  
3 people signed up.

4 But I think, again, we've hit a  
5 pretty good critical mass on the labels side.  
6 We will continue to obviously try to get that  
7 final 10 percent.

8 We take very seriously the other  
9 collecting societies that have said to us,  
10 "Hey, it will take you 10 years to get to 90  
11 percent of your artists." That's kind of our  
12 long-range goal.

13 Q Okay. I have just a few  
14 questions, Mr. Simson, about the history of  
15 some of the agreements in this area. You were  
16 asked by Mr. Steinthal about Webcaster I and  
17 the CARPs decision and the CARP's rejection of  
18 25 of the 26 RIAA agreements with webcasters  
19 as benchmarks. Do you recall that?

20 A I do.

21 Q Can you explain what you  
22 understand to be the reasons why the CARP

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1 rejected those 25 deals as benchmarks?

2 A Well, I think they were rejected  
3 based on a finding that there were other  
4 circumstances -- there wasn't equal leverage  
5 on the parties. I mean I think they looked at  
6 the Yahoo agreement and said, okay, we have  
7 two parties here of equivalent power, and  
8 that's why I think they used that as the  
9 benchmark; whereas, with the other services,  
10 there were different reasons why they rejected  
11 them and said not equivalent.

12 Q Was it the same party negotiating  
13 on the record company side on all of the 26  
14 agreements?

15 A Yes, it was.

16 Q And who was that?

17 A It was the RIAA.

18 Q Who were they representing?

19 A They were representing the major  
20 record companies at that time.

21 Q You were asked by Mr. Steinthal  
22 about SoundExchange's decision to enter into

1 an agreement in 2003 to carry forward with  
2 some modifications the CARP I, the Webcaster  
3 I rates. Do you remember that?

4 A I do.

5 Q Could you explain what your  
6 understanding is of the reasons why the  
7 SoundExchange side made that decision?

8 A Well, again, as I think I  
9 mentioned, there was a lot of uncertainty  
10 because the case was still on appeal. We had  
11 stopped getting royalties, so there were no  
12 revenues coming in. I think people were a  
13 little battle-weary, and I think it was let's  
14 push forward these rates and address them in  
15 the future.

16 Q You were asked as well about the  
17 2003 satellite agreement. Do you recall that?

18 A I do.

19 MR. SMITH: And at this point,  
20 Your Honor, I would make a motion to have  
21 discussion of that agreement be subject to the  
22 protective order since the terms of it are

1 confidential.

2 CHIEF JUDGE SLEDGE: What about  
3 the agreement?

4 MR. SMITH: My next question  
5 discloses the structure of the agreement and  
6 then asks him questions about why that was  
7 accepted. We have a motion to strike all this  
8 discussion, this entire topic, but at this  
9 point I want him to talk about the reasons why  
10 they negotiated that particular kind of  
11 agreement at that time. So in order to ask  
12 him that question, I need to ask him about the  
13 structure of the agreement, which is a  
14 confidential matter.

15 CHIEF JUDGE SLEDGE: This is a  
16 satellite agreement between whom and when?

17 MR. SMITH: It's between XM and  
18 SIRIUS and SoundExchange in 2003.

19 CHIEF JUDGE SLEDGE: Any objection  
20 to the motion to apply the protective order to  
21 questions relating to the satellite agreement  
22 between XM and SIRIUS, on the one hand, and

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1 SoundExchange, on the other hand, in 2003?

2 MR. STEINTHAL: No, Your Honor.

3 CHIEF JUDGE SLEDGE: No objection.

4 The motion is granted.

5 (Whereupon, the proceedings went  
6 into Closed Session.)

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1 BY MR. SMITH:

2 Q Can you think of other contexts in  
3 which the musical work and the sound recording  
4 rights tend to be valued the same?

5 A Well, if I can say, I think the  
6 whole attempt to take the musical work and the  
7 sound recording and the synch licensing  
8 business is just wrong as a benchmark because  
9 you're talking about one work, one recording,  
10 one -- in this case, we're talking about the  
11 blanket licensing of an entire catalog.

12 Q Why does that make a difference?

13 A Well, because I think if you look  
14 at the blanket licensing of catalogs, they are  
15 very different. They have very different  
16 characteristics.

17 So, for example, in the  
18 subscription business, the companies that  
19 license the record companies' catalogs are  
20 paying 50 percent of revenue and --

21 MR. SMITH: Before we talk about  
22 these sort of things, I'll just make a motion

1 to have discussion of the terms of the on-  
2 demand streaming and other subscription  
3 services be subject to the protective order,  
4 Your Honor.

5 CHIEF JUDGE SLEDGE: Say that  
6 again, please.

7 MR. SMITH: He's going into a  
8 discussion of the rates and terms of the  
9 agreements between record companies and the  
10 interactive streamed -- the interactive  
11 webcasters. Consistent with what we did with  
12 Mr. Eisenberg on Thursday, I think that those  
13 terms ought to be subject to the protective  
14 order.

15 CHIEF JUDGE SLEDGE: That's too  
16 vague. Which record companies and which  
17 webcasters?

18 MR. SMITH: Your Honor, I don't  
19 know what the witness is about to say. He was  
20 talking, I think, about the prevailing rate,  
21 which presumably would be all four record  
22 companies and the major on-demand services.

1 I don't know that he's going to talk about  
2 particular companies, but he's talking his  
3 understanding about what the market rate is.

4 CHIEF JUDGE SLEDGE: That's not  
5 subject to protective order.

6 THE WITNESS: In any event, in  
7 that marketplace the record companies are  
8 typically getting 50 percent of revenue, and  
9 the publishing catalogs are getting  
10 substantially less. Actually, it's an ongoing  
11 debate whether it's going to be somewhere  
12 around -- the range seems to be 6.5 percent to  
13 15 percent. So no matter where in that range  
14 it falls, it is still either a third of what  
15 the record companies get or maybe as low as an  
16 eighth for the blanket licensing of their  
17 catalogs.

18 So I think that's one instance  
19 where you look at blanket licensing of the  
20 entire catalogs. I know of no other areas  
21 where on a one-to-one relationship, other than  
22 the synch field, and I think, as Mr. Steinthal

1 mentioned someone could re-record the song  
2 with a piano, and therefore, you have a little  
3 different marketplace, but in no other area do  
4 I think there's a one-to-one relationship  
5 between the sound recording and the musical  
6 work.

7 BY MR. SMITH:

8 Q Okay. Now Mr. Steinthal asked you  
9 some questions about the royalties that are  
10 paid for musical works and sound recordings  
11 overseas or --

12 A That's correct.

13 Q -- or for over-the-air  
14 broadcasting. Do you recall that?

15 A I do.

16 Q Can you tell us what you know  
17 about the royalties that are paid for those  
18 two rights for webcasting in other countries?

19 A Sure. Mr. Steinthal asked me  
20 about PPL, in particular, and PRS, which have  
21 the same over-the-air rate for radio.

22 Q What country was that?

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1 A In the United Kingdom.

2 The webcasting rates are  
3 different. Webcasters in the United Kingdom  
4 pay a per-track, per-stream rate. There is no  
5 percentage-of-revenue rate available. It's  
6 slightly higher than our rate because of  
7 exchange conditions, actually, but it's a per-  
8 track, per-stream. I believe it's about nine-  
9 hundredths of a penny right now as opposed to  
10 our seven six two, seven-hundredths of a  
11 penny.

12 The PRS rate is substantially  
13 lower.

14 Q That's the rate for what?

15 A For the musical work. It's  
16 substantially lower.

17 So in webcasting I think in the  
18 United Kingdom there is the sense that  
19 streaming, internet streaming, is a different  
20 activity and should be treated differently  
21 than over-the-air radio.

22 Similarly, in the Netherlands,

1 SENA, the SoundExchange equivalent --

2 MR. STEINTHAL: Your Honor, I  
3 think the question was only about the UK.  
4 He's now answering a question that wasn't even  
5 put to him.

6 MR. SMITH: That's not correct,  
7 Your Honor. I asked him about other  
8 countries, plural.

9 CHIEF JUDGE SLEDGE: That's not  
10 what I remember, Mr. Smith. I sustain the  
11 objection.

12 BY MR. SMITH:

13 Q Can you tell us what you know  
14 about the royalties paid for webcasting by  
15 webcasters for musical works and sound  
16 recordings in other countries besides the UK?

17 MR. STEINTHAL: Your Honor, that's  
18 outside the scope of the cross. I object on  
19 that basis.

20 CHIEF JUDGE SLEDGE: Overruled.

21 THE WITNESS: Well, in the  
22 Netherlands the rate paid to SENA, which is

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1 the SoundExchange equivalent, for the sound  
2 recording, again, is substantially higher than  
3 the rate that's paid to BUMA-STEMRA, which  
4 collects for the musical work.

5 BY MR. SMITH:

6 Q Are there any other examples that  
7 come to mind?

8 A Those are the two that come to  
9 mind. You know, I would be in hazier  
10 territory in some other territories.  
11 Webcasting is still developing.

12 Q Okay. One more question I've been  
13 handed here on the question of SoundExchange's  
14 ability to distribute the royalties. Does the  
15 absence of reports of use from the webcasters  
16 play a role with that problem?

17 A It certainly does.

18 Q Can you explain what that means  
19 and then why?

20 A Sure. We have been getting  
21 payments from webcasters for a period of time  
22 without reports of use. They don't tell us



1 what they're playing.

2 The statute provides that they're  
3 supposed to give us reasonable notice of use,  
4 and I've always taken that to mean, if you're  
5 the owner of a sound recording, that means  
6 notice of that use, not maybe notice of one  
7 day's use or three days' use.

8 But when we don't get reports of  
9 use, we are holding onto money with no data to  
10 send out that money. Right now there is a  
11 pool of money that we are unable to distribute  
12 because we have no reports of use upon which  
13 to distribute it. So it's a frustration.  
14 We'd like to get that money out the door.

15 MR. SMITH: Your Honor, I have no  
16 further questions.

17 MR. FREUNDLICH: Your Honor, I  
18 have a few questions on recross.

19 CHIEF JUDGE SLEDGE: Okay.

20 RECROSS EXAMINATION

21 BY MR. FREUNDLICH:

22 Q Good afternoon, Mr. Simson.

1 A Good afternoon.

2 Q You testified a couple of times  
3 about, in response to questions from me and  
4 then in response to questions from your  
5 counsel, concerning why SoundExchange does not  
6 pay or cannot pay advances. Am I correct if  
7 I say that the reason is that the money coming  
8 in equals the money going out, and the only  
9 way to do that would be to borrow,  
10 essentially, from someone else's stream,  
11 someone else's stream of income?

12 A That's correct.

13 Q Okay. And that's because you're  
14 not a profit organization, right?

15 A Well, I guess that's true,  
16 although the idea is the record companies and  
17 the artists, this is their stuff. We are  
18 trying to get as much of it out the door as we  
19 can without taking any profit, just our costs.

20 Q Now what if your competitor,  
21 Royalty Logic, for example, had a fund of  
22 money that was there for the purpose of giving

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1 artist advances? Are you saying that they  
2 couldn't do that or they shouldn't do that?

3 A I am saying that I think it would  
4 be detrimental to the system because of the  
5 way advance money would be distributed.

6 Q But that's under SoundExchange's  
7 rules, right? What if Royalty Logic had  
8 different rules and was able to pay advances?  
9 Wouldn't that be a meaningful competition for  
10 artists to have in this field?

11 A No, because, as I mentioned, if  
12 we're going to compete, we'll compete for the  
13 biggest labels and the biggest artists by  
14 giving advances, and it's the smaller artists  
15 and the smaller labels who will suffer.

16 Q But I'm not talking right now  
17 about SoundExchange's policies; I'm talking  
18 about the potential policies of your  
19 competitors, like Royalty Logic. Isn't it  
20 true, Mr. Simson, that for the artists it  
21 would be healthy to actually have competition,  
22 one collective perhaps offering advances and

1 one collective like yours that doesn't?

2 JUDGE ROBERTS: Mr. Freundlich,  
3 the pool of money that you're speaking about,  
4 is this the pool of money collected under the  
5 statutory license or are you talking about a  
6 pool of money that RLI has separate from the  
7 statutory license?

8 MR. FREUNDLICH: I'm talking  
9 about, in this situation I'm talking about  
10 RLI's money generally, not just what it  
11 collects. In other words, funds to give  
12 advances, for instance.

13 JUDGE ROBERTS: Money that it has  
14 received elsewhere other than the statutory  
15 licenses?

16 MR. FREUNDLICH: Or that it has,  
17 right.

18 JUDGE ROBERTS: Other than the  
19 statutory licenses?

20 MR. FREUNDLICH: Right.

21 JUDGE ROBERTS: All right.

22 THE WITNESS: I'm sorry, could you

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1 repeat? Sorry.

2 BY MR. FREUNDLICH:

3 Q If your competitor, Royalty Logic,  
4 had monies that it wanted to give as advances  
5 or would use the monies from the statutory  
6 license to give those advances, wouldn't that,  
7 in fact, be meaningful competition for the  
8 artists and labels to have in this field?

9 A Again, I don't believe so, and I  
10 think I've testified that the competition is  
11 not a good thing in a statutory licensing  
12 environment. Competition drives the price  
13 down, which is not good for the owners and the  
14 copyright -- and the performers.

15 They're the ones sitting on the  
16 Board approving expenses and they're the ones  
17 who have the most self-interest in getting the  
18 most money distributed.

19 Q Okay. Moving on to another topic,  
20 you testified earlier about, I think it was,  
21 \$9 million that's being -- that was the size  
22 of the note between the RIAA and

1 SoundExchange.

2 A Correct.

3 Q Correct? And when was that note  
4 established?

5 A The note was established as part  
6 of the spinoff of the RIAA -- for  
7 SoundExchange from the RIAA. There had been  
8 monies expended for both the beginnings of  
9 SoundExchange before there were royalties  
10 coming in; there were monies expended for the  
11 negotiation of the PES CARP and certainly for  
12 the Webcaster I. They were far in excess of  
13 the \$9 million. In the negotiation between  
14 the artists and the labels to spin off, that  
15 was the agreed-upon number.

16 Q Okay. And when you say, "far in  
17 excess," was it twice as much as that?

18 A I don't really have the specific  
19 numbers, but it was well in excess of that.

20 Q Okay. Now when was the date when  
21 SoundExchange was spun off?

22 A September 29th, 2003.

1 Q Okay. Now --

2 CHIEF JUDGE SLEDGE: Mr.  
3 Freundlich, are you redirecting based on cross  
4 examination by another party?

5 MR. FREUNDLICH: I'm trying to get  
6 -- I'm not clear, actually, where it came  
7 from. I thought that they had testified about  
8 the expenses that had been recouped between  
9 the RIAA and the SoundExchange earlier.

10 CHIEF JUDGE SLEDGE: I think that  
11 came up from radio broadcasters' examination.

12 Mr. Smith, did you have anything  
13 related to any of this in your --

14 MR. SMITH: No, Your Honor, I did  
15 not talk about this recoupment.

16 CHIEF JUDGE SLEDGE: Wouldn't this  
17 be outside the scope of examination at this  
18 point?

19 MR. FREUNDLICH: It was my  
20 recollection that it was within what they  
21 said, but I don't know. Can I ask one more  
22 question, anyway, and then move on?

1 CHIEF JUDGE SLEDGE: Yes, sir.

2 MR. FREUNDLICH: All right.

3 BY MR. FREUNDLICH:

4 Q Is there an interest rate that was  
5 computed between the RIAA and SoundExchange?

6 A No, there's no interest; it's  
7 interest-free.

8 Q It's interest-free? Okay, thank  
9 you.

10 On Exhibit 97 you stated -- I just  
11 have two more areas, Your Honor.

12 CHIEF JUDGE SLEDGE: That's fine.

13 BY MR. FREUNDLICH:

14 Q You state in there that -- I'm  
15 going to paraphrase -- that transparency is  
16 involved here; that is, it's something that  
17 you want to provide to your members and your  
18 artists, that there's transparency. Is that  
19 fair?

20 A Right.

21 Q Okay. When you issue royalty  
22 statements to your artists and your labels, do



1 you detail for them the expenses that you've  
2 been deducting from the gross?

3 MR. SMITH: Objection. Well  
4 beyond the scope of anything I talked about on  
5 redirect, Your Honor.

6 CHIEF JUDGE SLEDGE: Mr.  
7 Freundlich?

8 MR. FREUNDLICH: Again, I'm not  
9 remembering where it came from, and I had some  
10 notes from the original day.

11 CHIEF JUDGE SLEDGE: Objection  
12 sustained.

13 MR. FREUNDLICH: I have nothing  
14 further.

15 CHIEF JUDGE SLEDGE: Any other  
16 questions relating to the matters that Mr.  
17 Smith addressed in his redirect some few  
18 minutes ago?

19 MR. STEINTHAL: Yes, Your Honor,  
20 just a few.

21 CHIEF JUDGE SLEDGE: All right.

22 RECROSS EXAMINATION

1 BY MR. STEINTHAL:

2 Q Mr. Simson, Mr. Smith asked you  
3 about the 2003 agreement with the DiMA  
4 companies, and I believe you used the words  
5 "pushed forward," that those rates were  
6 "pushed forward," is that right?

7 A As you and I discussed, there were  
8 differences, but pushed forward, yes.

9 Q All right, but the 10.9 percent of  
10 revenue rate for the new subscription services  
11 wasn't pushed forward? That was a brand-new  
12 rate that was --

13 A That's correct.

14 Q Now you mentioned the voluntary  
15 agreement between RIAA or SoundExchange and XM  
16 and SIRIUS in 2003. You said, I believe your  
17 words were, "They were on the verge of  
18 bankruptcy."?

19 A That's correct.

20 Q What support do you have for the  
21 fact that those companies were on the verge of  
22 bankruptcy?

1           A       There were reports in the press  
2 almost daily swirling around about how they  
3 were both very heavily in debt and they were  
4 going to have to re-organize, and they were  
5 searching for help from their equity partners  
6 and things of that nature.

7           Q       Were there conflicting reports  
8 about their potential growth as well?

9           A       Again, I don't recall that  
10 specifically.

11          Q       Now you mentioned, in response to  
12 Mr. Smith, as an example of an area of where  
13 musical works and sound recording compensation  
14 was not the same, the market for the labels'  
15 licensing of interactive on-demand services,  
16 correct?

17          A       Correct.

18          Q       Now, first of all, the rights that  
19 are being conveyed in those transactions by  
20 the labels to the interactive on-demand  
21 services are both reproduction and  
22 distribution rights as well as performance

1 rights, correct?

2 A That's correct.

3 Q And that's a market, the on-demand  
4 streaming conditional download services, that  
5 I believe you testified earlier is a market  
6 that is deemed by the labels to be very  
7 substitutional of CD sales?

8 A That's correct.

9 Q Next, you talk about the UK and  
10 the UK rate for webcasting as being somewhat  
11 above the initial CARP rate, and then you  
12 mentioned the currency. It's correct, is it  
13 not, to your understanding, that the UK rate  
14 was, in fact, derived from the U.S. CARP rate?

15 A That's correct.

16 Q And that PPL, the licensor, that  
17 adopted that and applied it in the UK did that  
18 based on basically voluntary grants by  
19 individual labels to license at that rate?

20 A That's correct.

21 Q And that PPL was not, in so  
22 acting, subject to any kind of copyright

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1 tribunal?

2 A I don't -- I'm not aware of that  
3 action.

4 Q Now, in addition, you mentioned  
5 the musical work rate for webcasting as being  
6 lower. Is that your understanding?

7 A That's correct.

8 Q Isn't it your understanding, sir,  
9 that there is a proceeding just like this one  
10 going on in the UK whereby the PRS and MCPS,  
11 the publishing collectives, are litigating  
12 against the webcasting services over what the  
13 rate should be for publishing rights?

14 A Actually, I'm not familiar with  
15 the proceeding.

16 Q Have you heard about it?

17 A No, actually, I haven't.

18 Q Have you heard at all that, in  
19 fact, the publishers in that proceeding are  
20 seeking, essentially, to ratchet rates up to  
21 be comparable to the PPL rates that were based  
22 on the CARP rate?

1 A I'm not aware of that.

2 MR. STEINTHAL: I have no further  
3 questions, Your Honor.

4 CHIEF JUDGE SLEDGE: Any other  
5 questions in response to the questions  
6 presented by Mr. Smith this afternoon?

7 (No response.)

8 All right, thank you. That  
9 completes the testimony of Mr. Simson.

10 (Witness excuse.)

11 And that will complete the  
12 evidence presented today.

13 Anything else to present before we  
14 adjourn?

15 (Off-the-record discussion.)

16 CHIEF JUDGE SLEDGE: We are  
17 recessed until 9:30 a.m.

18 (Whereupon, at 5:17 p.m., the  
19 proceedings in the above-entitled matter  
20 adjourned for the day, to reconvene the  
21 following day, Thursday, May 18, 2006, at 9:30  
22 a.m.)

**CERTIFICATE**

This is to certify that the foregoing  
transcript in the matter of:

The Digital Performance Right in  
Sound Recording and Ephemeral  
Recordings (Webcasting Rate  
Adjustment Proceeding)

Before: Copyright Royalty Board

Date: Wednesday, May 17, 2006

Place: Washington, D.C.

represents the full and complete proceedings of  
the aforementioned matter, as reported and  
reduced to typewriting.

